IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

APPEAL NO. 16-6001

UNITED STATES,
Appellee

v.

DZHOKHAR A. TSARNAEV,
Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR DEFENDANT-APPELLANT

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Introduction

Jahar Tsarnaev was tried in a community still suffering from his crimes. Two of the jurors who voted to sentence him to death lied during voir dire, including the foreperson, who falsely denied calling Tsarnaev a "piece of garbage" on Twitter, and, as the government concedes, failed to disclose that she and her family had sheltered in place in their Dorchester home during the manhunt. The District Court excluded evidence that Jahar's older brother Tamerlan, the architect of the bombings, had committed a brutal triple murder for "jihad" on September 11, 2011, evidence that would have supported crucial mitigating factors. According to the government, none of this matters. Venue was proper in Boston, neither juror lied, and the Waltham murders were irrelevant.

The government's reliance on Boston's size and the venirepersons' assurances of impartiality does not overcome the presumption of prejudice. Damning coverage of the bombings flooded newspapers, radio stations, and television programs in the Eastern Division of the District of Massachusetts. Accounts of the victims' terrible losses, the lockdown, and Tsarnaev's arrest and confessions saturated the venirepersons' Facebook and Twitter feeds. So did the opinions of civic leaders, survivors, and ordinary people that Tsarnaev should die. Social media, never more than the tap of a thumb away, immersed prospective jurors in minute-by-minute news of this case in a manner unimaginable when

Leslie Irvin, Wilbert Rideau, and even Jeffrey Skilling went to trial. As a result, two-thirds of the venire believed that Tsarnaev was guilty before hearing from a single witness. The bombings targeted and terrorized every member of this large community, which grieved and recovered as one: Boston Strong. In these extraordinary circumstances, no voir dire could ensure an impartial jury.

Responses to Tsarnaev's other principal claims fare no better. The government's excuses for the jurors' dishonesty depend on strained and improbable interpretations of plain voir dire questions, and its defense of the District Court's inaction ignores the "unflagging duty" to investigate juror misconduct reaffirmed in United States v. French, 904 F.3d 111, 117 (1st Cir. 2018). Evidence that Tamerlan had planned three murders and involved a less-culpable accomplice had direct bearing on the central sentencing question—the brothers' relative culpability—and preclusion of this material left the jurors with a distorted impression of Tamerlan's influence on his 19-year-old younger brother.

These constitutional errors, exacerbated by the others detailed in Tsarnaev's briefs, infected every aspect of this trial. Fresh proceedings—in an unaffected community, before honest and unbiased jurors, who know that the bombings were Jahar's first violent crimes but not Tamerlan's—present a real prospect of a different outcome. This verdict is unworthy of confidence and this Court should reverse.

I.

Because The Entire Eastern Division Of The District Of Massachusetts Was Affected By The Crime, No Fair Trial Could Be Held Here.

"A presumption of prejudice . . . attends only the extreme case." Skilling v. United States, 561 U.S. 358, 381 (2010). This is that extreme case. "[T]he entire city of Boston has been terrorized and victimized, and deep-seated prejudice against those responsible permeates daily life." In re Tsarnaev, 780 F.3d 14, 45 (1st Cir. 2015) (Torruella, J., dissenting) ("Tsarnaev II"). In the only prior case like this one—the Oklahoma City Bombing, another terrorist attack that reverberated through an entire municipality—the government consented to a change of venue, acknowledging how "profound and pervasive" "the effects of the explosion on [the] community" were. United States v. McVeigh, 918 F. Supp. 1467, 1470 (W.D. Okla. 1996). So too in Boston. And those effects did not abate in the months before trial. The publicity of the Marathon bombing in the Boston community was "unparalleled in American legal history." Tsarnaev II, 780 F.3d at 30 (Torruella, J. dissenting). OB.60.[1] If a presumption of prejudice is not warranted here, then where?

[1] The Appellant's Opening Brief is cited "OB." Appellant's First Supplemental Opening Brief is cited "First.Suppl.OB." Appellant's Second Supplemental Opening Brief on Davis is cited "Second.Suppl.OB." Appellant's Third Supplemental Opening Brief is cited "Third.Suppl.OB." The Government's Response Brief is cited "RB." The Government's First Supplemental Response Brief is cited "First.Suppl.RB." The Government's Supplemental Response Brief

Simply put, the Eastern Division of the District of Massachusetts, from which the venire was drawn, was different from anywhere else in the country. The Boston Marathon bombing was not an attack on Washington D.C., or New York, or San Francisco. Instead, it was an attack on an iconic cultural institution of greater Boston—the Boston Marathon, run on Patriots' Day every year since 1897. It was an attack on community members' loved ones, friends, and neighbors who were, or could have been, running in or watching the Marathon that day. Media coverage "focused not only on Tsarnaev, but on the city as a whole. Coverage included stories of the victims and their family and friends, those who bravely risked their lives to help the victims, and how the entire community came together." Id. at 31. Just as in McVeigh, this crime had "immeasurable effects on the hearts and minds of the people of" Boston. 918 F. Supp. at 1469.

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on Davis is cited "Davis.Suppl.RB." The Appendix is cited "A." Volume 1 of the Appendix is cited "1.A," Volume 2 is cited "2.A," and so on. The Government's Supplemental Appendix is cited "Supp.App." The separately-filed Sealed Appendix is cited "SA." The Addendum is cited "Add." The Sealed Addendum is cited "SAdd." The Supplemental Sealed Addendum is cited "Suppl.SAdd." The Second Supplemental Sealed Addendum is cited "Second.Suppl.SAdd." The separately- and electronically-filed Sealed Special Appendix, which contains the questionnaires of the non-seated prospective jurors, is cited "SPA." See November 7, 2018 Order of Court. Volume 1 of the Sealed Special Appendix is cited "SPA.1." Volume 2 is cited "SPA.2," and so on. The separately-filed, sealed, and firewalled 12.2 Appendix, which contains the record of proceedings relating to Fed. R. Crim. P. 12.2, is cited "12.2A." The separately-filed, sealed and firewalled 12.2 Addendum is cited "12.2Add." Entries on the District Court docket, United States v. Tsarnaev, 13–CR–10200 (GAO) (D. Mass.) are cited "DE." Government and defense exhibits are cited "GX" and DX."

The government does not dispute the facts regarding the notoriety of the crime and the effects of the media coverage: of the 99.7% of the venire (including all 12 seated jurors) who admitted exposure to publicity, only 4.88% could definitively say they had not already formed an opinion that Tsarnaev was guilty. 1.Supp.App.174. Only 21.63% could definitively say they had not already formed an opinion that Tsarnaev should die. Id. at 177; RB.69, 71, 85, 100. Instead, the government defends holding this trial in the midst of the sorrow and tragedy caused by the Tsarnaev brothers on two bases: the size of greater Boston, and the venirepersons' own assertions that they would put aside their opinions that Tsarnaev was guilty and should die. RB.56–57. On these two bases, the government argues that no presumption of prejudice was warranted and, in the alternative, that no actual prejudice has been shown.

As to the first basis, the fact that the Eastern Division has a population of nearly five million, and a large percentage of any jurisdiction in the country would have heard of the bombings, says very little about whether jurors in *this* jurisdiction could be fair. The Eastern Division was unique among the judicial districts in the country. Not only were many of the victims from towns within the Eastern Division, but several lived in the very same neighborhoods and towns (Dorchester, Franklin, Malden) as seated jurors. The entire venire of the Eastern Division was affected.

Moreover, although there was national news coverage of the bombings, it was the *local* coverage saturating the Eastern Division that reflected the distinct impact of the crime on greater Boston, just as the Oklahoma coverage did in McVeigh. 918 F. Supp. at 1471 ("The Oklahoma coverage was more personal, providing individual stories of grief and recovery . . . The nation was interested . . . in a more general sense. In contrast, because this was a crime that occurred in their state, Oklahomans wanted to know every detail about the explosion, the investigation, the court proceedings and, in particular, the victims."). Here, local stories detailed the impact of the crime on the families of the victims who had been killed. See OB.57–59. Local stories detailed the impact of the crime on specific surviving injured spectators—11 who testified at trial and more than 20 who did not—as well as the opinions of victims and family members that Tsarnaev should die. Id. at 58–59. And unlike the national coverage, the crush of local media coverage continued, even years after the bombings. See Tsarnaev II, 780 F.3d at 31 (Torruella, J. dissenting); DE.686–3 at 10; DE.686–4 at 7.

As to the government's second basis for affirmance, by relying on the assurances of venirepersons given in voir dire that they would set aside their beliefs that Tsarnaev was guilty and should die, the government ignores the very premise of the presumed prejudice inquiry. This inquiry does not assess whether the voir dire process succeeded in weeding out biased jurors; it assesses whether

adverse publicity so saturated the community that the voir dire process itself cannot ensure a fair trial. The jury questionnaires show the pervasiveness of the media coverage and the impact of the crime, as described in Tsarnaev's Opening Brief and conceded by the government. OB.77–84; RB.67, 69, 85; 1.Supp.App.123–172, 175. No voir dire could cure this, and it did not here, as discussed below, and as further demonstrated by the juror misconduct analyzed in Point II. As the Supreme Court concluded in Irvin v. Dowd, 366 U.S. 717, 728 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, reversal was required: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion." See also Sheppard v. Maxwell, 384 U.S. 333, 351 (1966).

The government nevertheless argues that a change of venue was not required. In the government's view (1) this case did not require a presumption of prejudice; (2) if such a presumption was required, it was rebutted; and (3) there was no actual prejudice because the seated jurors assured the District Court they could be fair. RB.63–105. Each of these arguments is without merit.

A. The government's arguments against a presumption of prejudice ignore both the nature of the crime against the community and the nature of the local media coverage.

1. Under Supreme Court precedent, a constitutional claim of presumed prejudice is subject to *de novo* review.

As a threshold matter, the government seeks to apply the abuse of discretion standard of review to the presumed prejudice claim. RB.63. As Tsarnaev has explained, more than 50 years ago the Supreme Court concluded that, in determining whether the Fifth and Sixth Amendments require a presumption of prejudice from pretrial publicity, appellate courts have "the duty to make an independent evaluation of the circumstances." OB.85–86 (quoting Sheppard, 384 U.S. at 362). More recently, in Skilling, 561 U.S. at 381–85, the Court performed the precise type of independent evaluation required in Sheppard, reviewing the factors relevant to the presumed prejudice calculus without deferring to—or even referencing—the District Court's findings.[2] In light of Sheppard, the Fifth, Eighth, Ninth and Tenth Circuits have recognized that a claim that pretrial publicity violated a defendant's constitutional right to a fair trial is subject to independent, *de novo* review. See United States v. McVeigh, 153 F.3d 1166, 1179 (10th Cir.

[2] The government accurately notes that, elsewhere, Skilling observed that "[i]n reviewing claims of this type, the deference due to district courts is at its pinnacle." RB.63 (quoting Skilling, 561 U.S. at 396). But that observation was made in the context of the Court's actual prejudice analysis, not its presumed prejudice analysis. 561 U.S. at 395.

1998); United States v. Williams, 523 F.2d 1203, 1208 (5th Cir. 1975); Tasby v. United States, 451 F.2d 394, 397 (8th Cir. 1971); Gawne v. United States, 409 F.2d 1399, 1401 (9th Cir. 1969). In United States v. Casellas-Toro, this Court presumed prejudice, holding that the District Court abused its discretion. 807 F.3d 380, 390 (1st Cir. 2015). It was therefore unnecessary for this Court to address whether Sheppard and Skilling dictate *de novo* review, and Casellas-Toro had not raised this question. Sheppard and Skilling govern the claim raised here.[3]

2. The nature of the crime, the nature of the publicity, the size of the community, the timing of trial and the six death verdicts all support a presumption of prejudice.

The government addresses only those factors from Skilling that, although informative, cannot be dispositive here: nationwide coverage of the bombings; size of the venire pool; timing of the trial; and the verdicts. RB.84–96. But the government overlooks that among the "important differences" that the Court found

[3] In support of application of the abuse of discretion standard, the government further cites to this Court's cases analyzing venue claims based on Fed. R. Crim. P. 21. RB.63 (citing United States v. Quiles-Olivo, 684 F.3d 177 (1st Cir. 2012) and United States v. Rodriguez-Cardona, 924 F.2d 1148 (1st Cir. 1991)). In doing so, the government fails to recognize that constitutional claims require *de novo* review while Rule 21 claims are reviewed for abuse of discretion. See Williams, 523 F.2d at 1208 (presumed prejudice claim based on pretrial publicity requires "reviewing court to undertake an independent evaluation of the facts" but in reviewing a claim under Rule 21 "absent an abuse of discretion, the district court's ruling will not be disturbed on appeal.") (citations omitted).

"separate Skilling's prosecution from those in which we have presumed juror prejudice" was the nature of the crime. Skilling, 561 U.S. at 381–82.

a. The nature of the crime.

The government entirely ignores the nature of the crime and its impact on the community in arguing against a presumption of prejudice. RB.67–96. This was not a financial fraud as in Skilling, 561 U.S. at 394–95. Economic loss—no matter how severe—cannot compare to the devastating loss of life and limb. And the victim-residents of Houston in Skilling were incidental to the crime, not its target. The unique nature of this crime and its impact on the entire Boston community must be central to any presumed prejudice calculus. See McVeigh, 918 F. Supp. at 1471–72 (considering the nature of the crime as one against the Oklahoma community, and the impact on and reactions of Oklahomans, in granting change of venue outside, rather than within, Oklahoma).

The residents of no other place stood watching the Marathon by the thousands while the bombs went off. The residents of no other place served as first responders and staffed the hospitals where hundreds of the injured were treated. The residents of no other place were asked to assist local authorities in searching for those responsible by providing video footage, photographs and leads. No other place had nearly one million residents—potential venirepersons, all—ordered to shelter-in-place and told that the defendant was trying "to kill them." OB.91–92.

No other place in the country had the same concentration of injured survivors returning to towns throughout the same region from which seated jurors would be selected and—just as important—into which they would return after deciding whether Tsarnaev should die.

The impact of this tragedy on the entire community ultimately became "embodied in the 'Boston Strong' campaign which 'rallied a city,' became 'shorthand for defiance, solidarity, and caring,' and 'present[ed] a unified front in the face of [a] threat.'" Tsarnaev II, 780 F.3d at 32 (Torruella, J., dissenting). The movement continues to this day, more than six years after the bombings. See, e.g., Boston Strong, http://staystrongbostonstrong.org (Oct. 10, 2019) ("The physical and emotional wounds sustained on April 15th, 2013 still affect our community."). As in Oklahoma City, Boston pulled together in response to the explosions. See McVeigh, 918 F. Supp. at 1471–72. This is to Boston's credit. But as the District Court found in McVeigh, with pride and unity can also come prejudice, because of the strong emotional response and need for vindication. Id. In the words of David Ortiz, "This is our fucking city, and nobody is going to dictate our freedom. Stay strong." OB.52–53.

b. Extent, nature, and impact of the publicity.

The media coverage reflected the nature of the crime. And, unlike elsewhere in the country, the media coverage in Massachusetts did not end. See,

e.g., Associated Press, Marathon Bombing Aftermath Was Top Massachusetts Story of 2014, MassLive (Dec. 26, 2014), https://www.masslive.com/news/2014/12/marathon_bombing_aftermath_was.html; see also Casellas-Toro, 807 F.3d at 383 (television coverage of Casellas-Toro received top Nielsen rating for that month). The extent and nature of publicity speak to jurors' ability or inability to approach Tsarnaev's trial with open minds. Contrary to the government's arguments, the publicity strongly supports a presumption of prejudice.

The extent of publicity here is not disputed. 99.7% of the venire admitted exposure to publicity about the case, including all 12 seated jurors. RB.85, 100. Compare Casellas-Toro, 807 F.3d at 387, 389 (presuming prejudice where 96.6% of venire was exposed to "massive" coverage of defendant); Rideau, 373 U.S. at 724–25 (presuming prejudice where, at most, 65% of the venire had seen the televised confession and only 3 of the 12 seated jurors had seen it); with Skilling, 561 U.S. at 382, n.15 (declining to presume prejudice where 43% of venire had never heard of defendant); United States v. Brandon, 17 F.3d 409, 441 (1st Cir. 1994) (no presumption of prejudice where "[o]nly five of the forty-seven prospective jurors had ever read or heard about the case . . . ."); United States v. Vest, 842 F.2d 1319, 1332–33 (1st Cir. 1988) (no presumption of prejudice where only "four of 31 jurors professed to know anything about the case"). And this publicity came in all forms: on local and network television; in print and online

news; among all forms of social media. RB.79; see Casellas-Toro, 807 F.3d at 387 ("The public took to Facebook and Twitter to publicly discuss Casellas's case").

Nor do the parties meaningfully disagree about the nature of the publicity. It is true, as the government notes, that the publicity "ha[d] largely been factual." RB.85, 88. Factual coverage can still be prejudicial. In Rideau, the Supreme Court presumed prejudice without finding the media coverage of defendant's confession to be false or misleading. 373 U.S. at 725. The prejudice derived from the nature of the police interview; the coverage of that interview was factual. And the "purely factual articles" discounted in Patton v. Yount, 467 U.S. 1025, 1032 (1984), are inapposite: the "facts" covered in those articles were the prolonged jury selection process, not the crime. Here, the pretrial publicity was the exact "kind of vivid, unforgettable information . . . likely to produce prejudice" missing in Skilling: a confession,[4] video footage of defendant committing the crime (viewed

[4] This Court's mandamus opinion stated: "As petitioner's counsel has admitted, there is no confession at all here." Tsarnaev II, 780 F.3d at 22. At trial, the government took a different view, arguing to the jury that the boat message was Tsarnaev's "written confession of guilt." 19.A.8726. Faced now with Rideau, the government changes course, calling Tsarnaev's writing a "manifesto" (see RB.7, 38, 90, 312–13, 323, 332, 337) rather than a "confession." See RB.88 ("lack of a confession"). This Court should not credit the government's about-face. This is especially so given the repeated coverage in the local press labelling the message, as the government did, a "confession." See, e.g., 24.A.10974 (*Boston Globe* story on A1, "he left a confession in the boat"); id. at 10977a–78 (*Boston Globe* story on A1, "According to the indictment, released last month, Tsarnaev allegedly wrote a confession in the boat . . ."); id. at 10979–80 (*Boston Globe* story on A1,

over 30 million times) and media coverage of defendant's dramatic arrest and the ensuing community celebrations. 561 U.S. at 384. See Casellas-Toro, 807 F.3d at 383 ("Citizens celebrated outside the courthouse and an entire stadium of people attending a baseball game erupted into cheers upon the news of the guilty verdict" in Casellas-Toro's state trial preceding his federal arrest). It included the precise type of material "readers or viewers could not reasonably be expected to shut from sight," Skilling, 561 U.S. at 382, such as the emotional and heart-wrenching impact evidence relating to specific victims who died and over 30 specific injured spectators, more than 20 of whom the government would never call at trial. OB.57–58.

Neither does the government contest that the coverage also included information that was "never offered in the trial," because it was "clearly inadmissible" or "inaccurate." Sheppard, 384 U.S. at 360–61 (presuming prejudice, in part, because media conveyed such evidence). The government concedes that these vices are also present here. RB.90–93. The pretrial publicity referred to evidence that was patently inadmissible, such as Tsarnaev's coerced admissions to the FBI and opinions from the victim's family members, surviving spectators and prominent community members alike that Tsarnaev should die. See

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"Tsarnaev allegedly wrote a confession in the boat"); id. at 11001 (*Boston Globe*, "he allegedly scrawled a confession").

23.A.10842–44, 24.A.10977a-78, 24.A.11047–51. The government also recognizes that the pretrial publicity referred to evidence that simply did not exist, such as that Tsarnaev wrote "Fuck America" in the boat. RB.91. Media also falsely claimed that he referred to the victims as "collateral damage." OB.56. But the government argues that false reporting does not support a presumption of prejudice because jurors would have learned the truth at trial. RB.91–92. This misses the thrust of Rideau: that jurors exposed to inaccurate or inadmissible information in the days, weeks, months, and years leading up to trial will reach opinions that will endure even when the information does not. 373 U.S. at 725–27.

Where the parties disagree is as to the impact of this extensive, powerful publicity. As the government concedes, of the 99.7% of the venire (including all 12 seated jurors) who admitted exposure to publicity, 69% had already formed an opinion that Tsarnaev was guilty, and only 4.88% could definitively say they had not already formed an opinion that Tsarnaev was guilty.[5] 1.Supp.App.174. And only 21.63% could definitively say they had not already formed an opinion that Tsarnaev should die. Id. at 177.

[5] To be sure, 25.13% of the venire indicated that they were "unsure" whether they had reached the opinion that Tsarnaev is guilty, and 46.25% were "unsure" whether they had reached the opinion that Tsarnaev should die. 1.Supp.App.175–76. The jurors' selection of "unsure" rather than the constitutionally-required "no" is significant.

Despite this, the government urges the Court to find no presumption of prejudice because during voir dire "more than half" the jurors said they could set aside their adverse opinions.[6] RB.67–70 (guilt); RB.70–72 (penalty). This ignores the purpose of having a *presumed* prejudice analysis, rather than simply analyzing actual prejudice in every case. The presumed prejudice inquiry assesses whether the community was so saturated with adverse publicity that the voir dire process itself cannot be relied upon to ensure a fair trial. Where such saturation occurs, "even the most careful voir dire process would be unable to assure an impartial jury." Flamer v. State of Del., 68 F.3d 736, 754 (3d Cir. 1995) (en banc) (Alito, J.). Thus, a reviewing court must perform an independent review of the nature and scope of publicity "without pausing to examine a particularized transcript of the voir dire examination." Rideau, 373 U.S. at 727; see Casellas-Toro, 807 F.3d at

[6] The government attempts to diminish the force of the 69% of jurors who presumed guilt by cobbling together the 4.88% of potential jurors who had not formed an opinion that Tsarnaev was guilty, the 25.13% who were unsure as to guilt, and the 26.07% who believed he was guilty but could set that aside, concluding that "more than half (56.08%) indicated no disqualifying prejudice as to Tsarnaev's guilt." RB.56, 68–70. This statistic is misleading. It is cold comfort that only slightly more than half of Tsarnaev's jury did not state opinions—even crediting their responses—that would *automatically* remove them from his jury for cause. Using the same logic, with only 21.63% of the venire stating they had not definitively formed the opinion that Tsarnaev should die, nearly 80% did not enter jury selection with an open mind as to penalty. And with only 4.88% definitively stating they had not formed a pretrial opinion that Tsarnaev was guilty, more than 95% of Tsarnaev's venire did not arrive affording him his constitutional right to the presumption of innocence.

388; see also Riley v. Taylor, 277 F.3d 261, 299 (3d Cir. 2001) ("[w]here media or other community reaction to a crime or a defendant engenders an atmosphere so hostile and pervasive as to preclude a rational trial process, a court reviewing for constitutional error will presume prejudice to the defendant without reference to an examination of the attitudes of those who served as the defendant's jurors.") (citations omitted).

The government's piecemeal efforts to recharacterize and diminish certain aspects of the publicity cannot overcome the impact on the entire venire of the coverage of Tsarnaev's explicit confessions to the crime, video footage of him actually committing the crime, dramatic footage of his arrest, and the victims' heart-wrenching trauma and recovery. The government, for example, deems Tsarnaev's inadmissible admissions to the FBI less "dramatic" and "indelible" than Rideau's televised confession. RB.90. This may be so, but the Supreme Court presumed prejudice in Rideau without the public watching a video of him committing the crime—let alone 30 million times. 373 U.S. at 726.

Without citation to any authority, the government further argues that regardless of the publicity, no presumption of prejudice can apply because defense counsel subsequently conceded guilt. RB.90–91. But, again, the presumed prejudice inquiry measures the effect of *pretrial* publicity. Defense counsel's trial strategy after the denial of efforts to move the trial is not relevant. In any event,

the view of defendant imbedded in the community's consciousness by the pretrial publicity did not bear solely on guilt. It spoke directly to the very aggravating factors the jurors would have to find and weigh at sentencing. The publicity about the four victims who died spoke directly to penalty. OB.57. The publicity about the injured survivors, both those who testified and those who did not, spoke directly to penalty. Id. at 57–58. The inadmissible views of family members, injured survivors and community leaders that Tsarnaev should die spoke directly to penalty. Id. at 58–59.

Most importantly, the government minimizes the impact of those calling for Tsarnaev's death in the press. The government agrees, as it must, that this type of evidence was inadmissible. See Bosse v. Oklahoma, 137 S. Ct. 1, 1–2 (2016). The government nevertheless argues that this publicity does not warrant a presumption of prejudice because the media also reported Cardinal O'Malley's personal opposition to the death penalty and, in August 2014 (seven months before voir dire), the *Boston Globe* ran an editorial disagreeing with the decision to pursue death. RB.93. The government's position appears to be that coverage in this area was, therefore, balanced.

But the coverage was in no way balanced. Parents of the deceased and injured called out for death, as did injured survivors. 24.A.10977a–78 (Patricia Campbell); id. at 11048 (Mark Fucarile); id. at 11050–51 (Liz Norden). The

government's suggestion that the inadmissible views of people so directly and devastatingly impacted by the bombings were neutralized because Cardinal O'Malley was personally opposed to the death penalty, or because the editorial staff of the *Globe* disagreed with then-Attorney General Eric Holder, simply blinks reality. This is especially true here, where, as the government knows, all jurors who might have agreed with Cardinal O'Malley were eliminated from the venire during the death qualification process. See post § III.B.1.

But even the entirely accurate, factual coverage of admissible—and indeed, admitted—evidence had a strong negative impact on Tsarnaev's ability to obtain a fair penalty phase, contrary to the government's suggestions. RB.89, 92–93. Just as in Rideau, those confessions ultimately admitted at trial did not obviate the harm of the unadmitted confession: "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." 373 U.S. at 726. As in McVeigh, the constant pretrial showing of Tsarnaev's crime on Boylston Street and the devastation left in its wake, the photographs of Tsarnaev emerging from the Watertown boat after the manhunt in the area, the order to shelter-in-place, and the intensely local personal stories of the victims cut too deep for any mitigation offered at trial to be meaningfully considered by this venire. See 918 F. Supp. at 1472–73. For all those prospective jurors who read about Tsarnaev's confessions, saw and heard video footage of him committing the crime

and were confronted with extremely powerful information about the impact of the bombings on victims over and again prior to trial, "in a very real sense [this] was [Tsarnaev's] trial." See Rideau, 373 U.S. at 726.

c. Size of the community.

That coverage of this nature, of a crime of this nature, occurred in a large metropolitan area is of little consequence. To be sure, "the size and characteristics of the community" are factors this Court must consider. Skilling, 561 U.S. at 382; see OB.91; RB.84–88. As the Supreme Court has explained, size of the community is relevant to the venue calculus because of the assumption that a large community can dilute the impact of adverse media. Skilling, 561 U.S. at 384. Not so here: the fact that 99.7% of the venire was exposed to the negative publicity proves that media coverage was omnipresent, not diffused. In contrast to the 43% of Skilling's venire who had never heard of him, virtually every member of Tsarnaev's venire had. See id. at 382 n.15; see Casellas-Toro, 807 F.3d at 384, 386 (presuming prejudice in district of three million people where there was "almost an unanimous show of hands" among the venire when asked who had heard of defendant). And any salutary effects a large community could have otherwise offered were eliminated by Governor Patrick's order to shelter in place during the manhunt. Nearly one million residents of the Eastern Division were

directly impacted by this order, and many more were indirectly impacted, knowing someone covered by the order.

The government provides a map showing that seated jurors and alternates were drawn from "a large part of the state, not just Boston," suggesting that the "geographic diversity of the jury pool" undercuts the need for a presumption of prejudice. RB.87–88. But the government again ignores the nature and impact of this crime. It is true that jurors here came from towns located throughout the Eastern Division. RB.87; DE.1639. But this actually highlights the extent of the publicity: even though the seated jurors were from different parts of the district, every single one of these jurors admitted having been exposed to the negative publicity.

And, the government's map also ignores that some of the seated jurors came from the very same towns as victims and badly injured survivors. For example, Juror 286, the foreperson of the jury, whose dishonesty in the voir dire is described in Point II, lived in Dorchester, the same neighborhood as Martin Richard, the eight-year-old who died in the bombings, and his older sister, Jane, who survived but was badly injured. Add.537; 23.A.10810, 10856. Juror 395 lived in Malden, the same town as injured survivor James Costello. 26.A.11855, DE.461–4 at 378; DE.461–5 at 277; DE.461–12 at 672. Juror 41 lived in Franklin, the same town as injured survivor Sarah MacKay. 24.A.10945; 26.A.11715. But these three jurors

did not only come from the very same towns as the maimed and deceased. They went home to those towns every night of this trial. And they decided whether Tsarnaev would live or die knowing they were returning to those shared towns.

d. Lapse in time.

Although the government argues that the 20-month time lapse between the bombings and trial permitted media coverage to subside, it offers no documented drop in publicity to support this argument. RB.94–96. The only hard data in the record on this point suggests that, to the contrary, as might be expected, media coverage was increasing again as trial approached. The data provided in support of the November 2014 motion for change of venue showed that—between the *Boston Globe* and the *Boston Herald* alone—there were 53 articles about the case during August 2014, 51 articles during September, 84 articles during October 2014 and 34 articles during the first 15 days of November 2014 alone—a total of 222 articles in two local papers in less than four months. DE.686–3, at 10; DE.686–4, at 7.[7]

In light of these facts, the government's reliance on Yount, 467 U.S. 1025, is misplaced. RB.95. Yount involved the murder of one person, in the town of

[7] Jury selection began in January 2015. Nothing in the record suggests the pace of coverage slowed between mid-November 2014 and January 2015. If anything, the coverage may have increased, not only because the much-anticipated trial was approaching but because at the beginning of jury selection, there was a terrorist attack on the French newspaper Charlie Hebdo which garnered particular attention as the local press compared the fact that the two attacks each had been committed by two brothers who were Muslims. DE.953, at 2–4; DE.958–6.

Luthersburg, in Clearfield County, Pennsylvania. 467 U.S. at 1032. In that case, the Court refused to presume prejudice where there had been significant publicity prior to the defendant's first murder trial, but four years later, in the 18 months prior to the defendant's second trial "[t]he record reveals that . . . each of the two Clearfield County daily newspapers published an average of less than one article per month." Id. By contrast, the publication rate here—more than 55 articles per month—is more than 50 times what the publication rate was in Yount. And this does not even consider the cable news media, the Internet or social media—sources that did not exist when Yount was tried in 1970.

e. Jury verdicts.

Finally, citing Skilling, the government argues that "the jury's verdict undermines a presumption of prejudice." RB.96. In Skilling, the Supreme Court held that the jury's acquittal on 9 of 27 counts undermined any claim that the pretrial publicity required a presumption of prejudice. 561 U.S. at 383–84. The government recognizes that Tsarnaev's jury convicted on all 30 charged crimes, but argues that at the penalty phase, their imposition of only six death sentences "indicates just as persuasively as the acquittals in Skilling that the jury did not act out of bias." RB.96.

It does nothing of the sort. The government ignores the significant differences between the full acquittals involved in Skilling and the six death

sentences imposed here. After all, as jurors would certainly know, Tsarnaev could only be put to death once. The imposition of six separate death sentences can hardly be considered an act of mercy such as to establish that jurors were either unaffected by the pretrial publicity or willing to ignore the community sentiment into which they would be returning. In short, looking at these factors collectively warrants a presumption of prejudice.

B. Regardless of whether the presumption of prejudice is rebuttable, reversal is required here.

After first arguing that the jurors' assurances of impartiality during voir dire should prevent a presumption of prejudice, RB.80–84, the government argues in the alternative that the same assurances can be used to rebut any presumption of prejudice. RB.97–105. The Supreme Court has not decided whether the presumption can be rebutted. See Casellas-Toro, 807 F.3d at 388. But the Supreme Court's prior precedent strongly suggests that when adverse publicity is so hostile that it raises a presumption of prejudice, that presumption is not rebuttable. See Rideau, 373 U.S. at 726–27; see also Sheppard, 384 U.S. at 362–63; Estes v. Texas, 381 U.S. 532, 550–51 (1965); McVeigh, 153 F.3d at 1182 (when a defendant carries the heavy burden of showing presumed prejudice, publicity must be considered "prejudicial as a matter of law.").

In Rideau, after presuming prejudice based on the television broadcast of defendant's filmed confession, the Court reversed "without pausing to examine a

particularized transcript of the voir dire" to see potential or seated jurors' own claims as to partiality or impartiality. 373 U.S. at 727. The Court did so even though voir dire showed that only 3 of the 12 jurors had seen the broadcast; none of the three "testified to holding opinions of [defendant's] guilt"; and all three agreed they would "give the defendant the presumption of innocence" and "base their decision solely upon the evidence." Id. at 732 (Clark, J., dissenting).

If the government is correct—that the presumption of prejudice requires reversal only where the record of voir dire shows actual prejudice—then the presumption is meaningless. It is necessarily subsumed by the separate inquiry into actual prejudice. Where the presumption is applicable precisely because of the risk that voir dire cannot assure an impartial trial, relying on that very same voir dire to rebut the presumption makes no sense.

Potential jurors in a venue prejudiced by pretrial publicity can become infused with biases they cannot recognize or will not disclose. See McVeigh, 918 F. Supp. at 1472; Estes, 381 U.S. at 545; Irvin, 366 U.S. at 727–28. A "juror may have an interest in concealing his own bias," or "may be unaware of it." Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring). As discussed in Point II, that is precisely what happened here: two seated jurors concealed their own biases by giving false answers during the jury selection process. Moreover, the "psychological impact" of requiring each potential juror to declare his fairness

can engender bias, provoke false assurances, or result in sincere expressions of impartiality that are fleeting at best. Irvin, 366 U.S. at 728; see United States v. Dellinger, 472 F.2d 340, 375 (7th Cir. 1972) ("natural human pride" may compel juror to assert his fairness).

Even if a juror honestly believes before trial that he or she can objectively hear the evidence, when a community has been aroused to a fever pitch the prospective juror may come to fear "return[ing] to neighbors" with anything other than a guilty verdict and a death sentence. Estes, 381 U.S. at 545. This concern was very much implicated here, where some of the jurors came from the same towns as victims of the bombings. As prospective Juror 50 noted during voir dire

[redacted] SPA.3.1343.[8] See also McVeigh, 918 F. Supp. at 1473 ("[W]hen there is such identification with a community point of view . . . jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.").

[8] Similarly, although seated Juror 138 hid this information from the District Court when he was questioned in voir dire, during jury selection he received a Facebook comment advising him to "play the part so u get on the jury then send him to jail where he will be taken care of." 25.A.11537. After imposing death, seated Juror 138 received Facebook comments saying "Atta boy," "That's awesome, good choice," "Great job Mike! Thanks for serving up some justice" and "Good job bro!!!!!" 25.A.11622–23. See post Point II.

Here, even assuming the presumption could be rebutted, it was not. As an initial matter, because of the constitutional rights involved, the government should be required to prove beyond a reasonable doubt that no seated juror was actually affected by media and community bias. See Chapman v. California, 386 U.S. 18, 24 (1967); 18 U.S.C. § 3595(c)(2); Fed. R. Crim. P. 52(a). Proving beyond a reasonable doubt that no juror was prejudiced is an exacting burden, and one the government cannot satisfy here. Even the Fifth Circuit—which, unlike this Court, has held the presumption rebuttable—has suggested that "a showing that none of the twelve jurors impaneled had ever been exposed, first or second hand, to the inflammatory publicity, would probably suffice." Mayola v. State of Ala., 623 F.2d 992, 1001 (5th Cir. 1980); see also United States v. Chagra, 669 F.2d 241, 252 (5th Cir. 1982) (presumption rebutted where 11 "jurors knew nothing about this case" and the twelfth had only "minimal contact").

The government has made nowhere close to such a showing. To the contrary, all 12 seated jurors admitted to exposure to pretrial publicity: two had been exposed to a little; ten had been exposed to either a moderate amount or a lot of publicity. 26.A.12132. Six of these 12 jurors conceded in their questionnaires they thought defendant was guilty: three admitted so directly, while another three said they already had decided he had participated in the bombings. OB.97. Five of the seated jurors had donated money to charities to aid the victims. OB.83. The

government does not dispute any of these facts. RB.100–04. Thus, even assuming a presumption of prejudice could be rebutted, it was not rebutted here.

C. The record of voir dire establishes actual prejudice.

Because Appellant has established a presumption of prejudice, this Court need not reach the actual prejudice inquiry. See Casellas-Toro, 807 F.3d at 390, n.6. In any event, the record of voir dire in this case establishes actual prejudice. The government does not dispute that 99.7% of the venire was exposed to the massive pretrial publicity; of that number, 69% believed Tsarnaev was guilty, and of that number, 37% believed he should die[9]—all before the prosecution presented any evidence. RB.67, 85; 1.Supp.App.123–72. Despite this, the government argues that the voir dire record does not show actual prejudice for two reasons.

The government first relies on Yount, arguing that "the Supreme Court rejected a challenge to the jury where 77% of the venire 'admitted they would carry an opinion into the jury box.'" RB.99 (quoting Yount, 467 U.S. at 1029). But, as discussed above, not only did Yount involve a dramatic reduction of publicity between the murder and the trial—an average of less than one article per

[9] The parties agree on the raw data underlying these calculations, with the exception of whether to count Juror 726's answers as valid or invalid. Out of the whole venire, the government asserts that 23% had formed the pretrial opinion that Tsarnaev should die (RB.71). Tsarnaev's 37% statistic instead looks to the penalty prejudgments of those jurors who had already determined him guilty. Compare 1.Supp.App.177 (324 out of 1373) with 26.A.12138 (325 out of 877).

month in the final 18 months—but in that four-year period many of the jurors had "let the details of the case slip from their minds" and any opinions they once held had weakened or been eliminated. Id. at 1033. In contrast, here, the government repeatedly admits the direct correlation between the amount of publicity a potential juror heard, and the likelihood that in the absence of any evidence, the juror would have already concluded defendant was either guilty or deserved to die. RB.73, 76 (admitting guilt phase correlation); RB.75 (admitting penalty phase correlation).[10]

[10] To be sure, the parties disagree about how best to characterize the precise level of this correlation. Because the parties are in substantial agreement on the raw numbers, however, the Court need not dwell on the different characterizations.

Even accepting the government's own figures, there were 912 prospective jurors who believed Tsarnaev was guilty before hearing a single witness. RB.73. Of this group, 13 had been exposed to a little publicity and 540 had been exposed to a lot of publicity. RB.73. This is a ratio of 42 to 1. In other words, a prospective juror who believed Tsarnaev guilty was 42 times more likely to have been exposed to a lot of publicity than a little. The government proposes a different characterization using these same numbers, noting that 18% of jurors exposed to a little publicity believed Tsarnaev was guilty and 89% of jurors exposed to a lot of publicity reached that conclusion. RB.73. In the government's view, a prospective juror was only 500% more likely to believe in guilt if they had been exposed to a lot of publicity.

The same is true for the correlation between amount of publicity and belief that death was proper. Even accepting the government's own figures, there were 322 prospective jurors who believed Tsarnaev should die before trial began. RB.75. Of this group, 2 had been exposed to a little publicity and 210 had been exposed to a lot of publicity. RB.75. This is a ratio of 105 to 1. In other words, a prospective juror who believed Tsarnaev should die was 105 times more likely to have been exposed to a lot of publicity than a little. The government again proposes a different characterization with these same numbers, noting that 18% of jurors exposed to a little publicity believed Tsarnaev deserved death and 42% of jurors exposed to a lot of publicity reached that same conclusion. RB.75. In the

The government's second argument against actual prejudice focuses not on the venire as a whole, but on the 12 seated jurors. RB.100–05. While the fact that all 12 jurors were exposed to publicity does not, in and of itself, show actual prejudice, RB.100–01, it certainly distinguishes this case from those in which the court was able to seat jurors who had never been exposed to the publicity. See Brandon, 17 F.3d at 441 (five of 47 prospective jurors familiar with case); Vest, 842 F.2d at 1332–33 (four of 31 jurors familiar with case).[11]

The government discounts that six seated jurors admitted they thought Tsarnaev guilty and five had contributed to victims' charities because they "checked the box saying they would be able . . . to set aside their opinions" and in open court agreed to decide the case based on the evidence. RB.101, 103–04. But, again, such assurances do not resolve the actual prejudice inquiry.[12] Were it

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government's view a prospective juror was only 233% more likely to believe death was proper if he or she had been exposed to a lot of publicity.

As the government concedes, however, regardless of which characterization is accepted, there is a marked correlation between exposure to publicity and belief in either guilt or death as the appropriate penalty. This correlation speaks directly to the nature of the publicity.

[11] The government accurately notes that many other jurisdictions—including Tsarnaev's preferred venue of Washington D.C.—also had high exposure rates. RB.101. But the government ignores the far more important data point: Washington D.C. had a substantially lower prejudgment rate than Boston as to both guilt and penalty—and D.C. was not victimized by the bombings. 23.A.10770–71.

[12] The government likewise concedes Tsarnaev's assertion of a correlation, in the venire, between the amount of publicity viewed and the willingness to set aside adverse views. RB.76. As shown, watching more publicity created a more fixed

otherwise, the Supreme Court would not have found actual prejudice in Irvin where all 12 of the seated jurors "said that [they] would be fair and impartial to petitioner." 366 U.S. at 728; see also Murphy v. Florida, 421 U.S. 794, 800 (1975) ("the juror's assurances . . . cannot be dispositive of the accused's rights.").

The Supreme Court has held that in assessing the reliability of those jurors who give the expected assurances of impartiality, reviewing courts may consider the voir dire responses of those prospective jurors who admitted to disqualifying prejudice. Id. at 803. The higher the percentage of prospective jurors who admit to prejudice against the defendant, the greater the concern about the reliability of assurances of impartiality from other jurors. See id. This Court has recognized the same. Casellas-Toro, 807 F.3d at 390.

The Opening Brief details troubling responses from many prospective jurors reflecting significant biases against Tsarnaev. OB.45, 72–76, 95–96. Given the nature of the crime and the attendant publicity, the venire's prejudice against Tsarnaev was both understandable and palpable. In response, the government notes that while many prospective jurors did voice the community's outrage, others

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view. Id. (48% of jurors who viewed a moderate amount of media could not set aside their views, whereas 81% of those who viewed a lot could not do so). This Court ought not credit the government's competing assertion that "those exposed to a 'little' media coverage were actually *more* likely to be unable to set aside their views than those exposed to 'a lot' of coverage," as it is based on a sample size of two out of the 1,373 prospective jurors.

indicated they could be fair, highlighting 14 prospective jurors' comments. RB.81–82. Given the understandable expressions of deep and bitter prejudice that permeated the voir dire, OB.72–76, 95–96, the expressed aspiration of a handful of prospective jurors that they would try to be impartial does not change the calculus in any appreciable way.[13]

Ultimately, the government's position is that the voir dire process effectively rooted out those prospective jurors who harbored bias or were subject to community pressure. Yet the government concedes, in answering Appellant's separate argument regarding the misrepresentations of two seated jurors during voir dire (Point II), that the voir dire process did not reveal that one of seated Juror 138's Facebook friends commented on Facebook that he should "play the part so u get on the jury then send him to jail where he will be taken care of." RB.114. The government concedes that the voir dire process did not reveal that another of Juror 138's friends commented that "if you're really on jury duty, this guys (sic) got no

[13] Not one of the 14 prospective jurors the government cherry-picks to establish the impartiality of the venire was exposed to a lot of publicity; they were all exposed to either a moderate amount or a little publicity. SPA.1.189 (PJ 7); SPA.2.581 (PJ 21); SPA.4.1869 (PJ 69); Id. at 2037 (PJ 75); SPA.5.2485 (PJ 92); Id. at 2653 (PJ 98); SPA.6.3045 (PJ 113); SPA.7.3493 (PJ 129); Id. at 3633 (PJ 134); SPA.49.26928 (PJ 980); SPA.53.29251 (PJ 1063); SPA.55.30540 (PJ 1109); SPA.57.31688 (PJ 1150); 26.A.12122 (PJ 638). Given that approximately half of all prospective jurors in the venire were exposed to a lot of publicity, and the government concedes a direct correlation between the amount of publicity a potential juror was exposed to and a belief that defendant was guilty and should die, the views of these selectively culled 14 jurors are hardly representative.

shot in hell." RB.113–14. The government concedes that the voir dire process did not reveal that Juror 286 lied when she denied having sheltered-in-place. RB.124. The government concedes that voir dire did not reveal that Juror 286 gave additional false answers to other "material" questions, failing to disclose that she had tweeted on social media that Tsarnaev was a "piece of garbage." RB.111–12, 122. There is no telling what else voir dire missed. On this record, the Court should not rely on the voir dire to have weeded out the pernicious effects of nearly two years of unparalleled hostile publicity. Actual prejudice has been shown and reversal is required.[14]

[14] In his Opening Brief, Appellant separately contended that even if there was no presumed or actual prejudice under the Sixth Amendment, reversal was nevertheless required because the District Court's refusal to change venue violated Federal Rule of Criminal Procedure 21 and the Eighth Amendment. OB.92–93, 99–101. The government disagrees. RB.106–08. These issues are fully joined by the current briefing before the Court.

II.

The District Court's Denial Of Cause Challenges To Jurors 286 And 138, And The Court's Refusal To Investigate Their Dishonesty, Violated The Fifth, Sixth, And Eighth Amendments.

Juror misconduct and judicial inaction tainted this verdict. Asked if she had "commented on this case . . . in an online comment or post," Juror 286, the foreperson, hid 22 Twitter posts in which she had mourned the victims, praised police officers who would testify at trial, and called Tsarnaev a "piece of garbage." Asked if she or a family member had been ordered to "shelter in place," the juror concealed that she had been "home locked down" with her family in Dorchester, the same neighborhood where eight-year-old victim Martin Richard lived. For his part, Juror 138 started a Facebook discussion about the jury selection process, during which a friend urged him to "play the part," "get on the jury," and "send" Tsarnaev "to jail where he will be taken care of." But when the juror appeared for voir dire, he falsely swore that he had followed the District Court's instructions not to "allow yourself to be exposed to any discussions of this case in any manner," and falsely denied that his Facebook friends had been "commenting about this trial." Before the jury was seated, the defense presented the Court with documentary proof of this bias, dishonesty, and misconduct. But the Court undertook no investigation, declining to ask either prospective juror a single follow-up question before summarily denying Tsarnaev's cause challenges.

In its response brief, the government concedes multiple premises of Tsarnaev's argument. The government does not dispute that Jurors 286 and 138 wrote these social media posts. It agrees that the questions put to Juror 286 were material (RB.122), and does not contest that the questions put to Juror 138 were, too. The government concedes the inaccuracy of Juror 286's sworn statement that she had not sheltered in place. RB.124. It acknowledges that if this Court deems the District Court's non-existent inquiry inadequate, then this Court must at least remand for further proceedings. RB.135 n.33. And the government's perfunctory briefing waives reliance on the District Court's alternative timeliness ruling. See United States v. Caraballo-Cruz, 52 F.3d 390, 393 (1st Cir. 1995). When it comes to defending the judgment on the merits, the government adopts strained and unrealistic readings of straightforward voir dire questions; minimizes the jurors' plain statements of bias and their transparent efforts to deceive; and ignores that the Court struck other venirepersons for cause on each of the grounds that Tsarnaev asserts with respect to Jurors 286 and 138.

A. Juror 286, the foreperson, should have been dismissed for cause.

With respect to Juror 286, Tsarnaev satisfies both prongs of the "binary test" set forth in Sampson v. United States, 724 F.3d 150 (1st Cir. 2013) ("Sampson II"). He has shown that Juror 286 "failed to answer honestly a material voir dire question," and that "a truthful response . . . 'would have provided a valid basis for

a challenge for cause.'" Id. at 164–65 (quoting McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984)).

1. Juror 286 answered material questions dishonestly.

a. Juror 286 falsely denied posting on Twitter about this case.

The government starts with semantics: "Juror 286 could reasonably have believed that tweeting or retweeting about events surrounding the 2013 Boston Marathon was not 'comment[ing] *on this case*,'" because "[t]he word 'case' ordinarily refers to legal proceedings." RB.123 (quoting Add.553). For that definition, the government points to the "legal sense" of "case" from the Oxford English Dictionary ("OED"), and a specialized reference, Black's Law Dictionary. Id.

But elsewhere, the government assures us that this is not how lay jurors think. "'Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might.'" RB.365. They "apply a 'commonsense understanding of the instructions . . . ,' rather than 'technical hairsplitting.'" Id. (quoting Brown v. Payton, 544 U.S. 133, 143 (2005)). The principal, nontechnical, definition of "case" is "a set of circumstances or conditions," "a situation requiring investigation or action (as by the police)," or "the object of investigation or consideration." Merriam-Webster's Dictionary (2019), https://bit.ly/2khQSuM. The "legal sense" in the OED accords: "[a]n

incident or set of circumstances under investigation by the police or a detective." Oxford English Dictionary (3d ed. 2014). Those definitions describe not Tsarnaev's "legal proceedings" but the events that prompted them.

Any "commonsense" venireperson would have read the question in the standard, broader, sense. Before completing their questionnaires, the prospective jurors learned that "[t]he purpose of the jury selection process" was "to try to ensure that each person selected is an appropriate juror," capable of deciding the issues "fairly and impartially." E.g., 1.A.192–93. To that end, the questionnaire included a query on the topic most likely to bear on impartiality, namely, the venirepersons' exposure to pretrial publicity (Question 73). E.g., Add.552. This question used the term "case" in a context that makes clear the parties' and the Court's intent to employ the broader sense: "How would you describe the amount of media coverage you have seen about this case." Id. This question would not have served its purpose had it used "case" in the government's narrow sense; for example, had it referred to "media coverage" of Tsarnaev's arraignment, but not his arrest and boat confession. Rather, any reasonable venireperson would have understood the question to encompass publicity about both the "legal proceedings" and the underlying facts. And such a venireperson would have read Question 79, which appeared on the next page of the questionnaire and used an analogous phrase ("on this case"), in the same way: to call for disclosure of all "preconceived

opinions" about the bombings, the victims, or Tsarnaev (not only those linked to the "legal proceedings"), because all such opinions would bear on the juror's capacity to serve "fairly and impartially." See, e.g., United States v. Moreno Morales, 815 F.2d 725, 733 (1st Cir. 1987).

More important, Juror 286's voir dire answers confirm that she herself understood "case" in the standard, not the specialized, sense. The District Court asked: "You have probably seen things about the case?" She responded by describing coverage of Tsarnaev's arrest, not his legal proceedings: "I'll tell you, I watch the news. I've seen reports of . . . everything on the news. . . . I assume while I'm watching the news that . . . the police . . . got who they were looking for." 5.A.2009. Likewise, defense counsel asked: "You've . . . not had any conversations really about this case?" Again, the juror responded by discussing the facts: "[J]ust in general. Hey, did you hear what happened at the Marathon?, something like that." 5.A.2017–18. The government ignores these exchanges.

Next, the government tries a different take on the questionnaire's language, speculating that Juror 286 "might have understood the question's reference to 'a letter to the editor, in an online comment or post, or on a radio talk show,' as referring to something more formal than a tweet or retweet." RB.123 (quoting Add.553). The government offers no authority for this idiosyncratic reading of an unambiguous question, and once again, ordinary usage refutes the government's

interpretation. The questionnaire asked about "online . . . post[s]." Everyday examples referring to tweets as "posts" abound.[15] One need look no further than the government's own discussion of Juror 286's social media activity. E.g., RB.110 ("[B]etween April 2013 and April 2014, Juror 286 had tweeted or retweeted posts about the Boston Marathon bombing 22 times."); RB.111 ("Over the following year, Juror 286 retweeted additional posts relating to the victims."); RB.125 ("[S]he retweeted a post written by someone else that said, 'Congratulations to all of the law enforcement professionals who worked so hard and went through hell to bring in that piece of garbage.'"). As above, Juror 286's own words confirm that she understood "posts" to encompass tweets and retweets. On her questionnaire, she described her activity on Twitter as posting. See Add.544 ("Facebook, Instagram and Twitter don't post daily but usually will read or look at daily.")

[15] E.g., Evie Lu, Yes, Trump's Tweets Move The Stock Market. But Not For Long, Barron's (Sept. 9, 2019) ("President Donald Trump's frequent Twitter posts move the stock market."), https://www.barrons.com/articles/donald-trump-twitter-stock-market-51567803655; Neil Vigdor, Michigan Beauty Queen Ousted Over "Offensive" Twitter Posts, Officials Say, N.Y. Times (July 21, 2019), https://www.nytimes.com/2019/07/21/us/miss-michigan-kathy-zhu.html; Am. Consumer Credit Counseling, Inc. v. Am. Consumer Credit, LLC, 2017 WL 1534190, at *5 n.3 (D. Mass. Apr. 27, 2017) ("Looking at the full Twitter posts, however, reveals that each Twitter post cited by Plaintiff is framed in reference to timeshares, and not budgeting or financial planning generally.").

In any event, Juror 286's voir dire responses demonstrate deception, not just misunderstanding. The District Court asked the juror whether she used social media, including Twitter, "[m]ostly for family or social" purposes. 5.A.2007. If, as the government contends, Juror 286 meant to be forthright, she would have responded by disclosing her posts about Tsarnaev. Instead, she gave a misleading answer intended to convince the parties that her Twitter account contained nothing material: "Twitter, I watch TV and kind of tweet while I'm watching TV with other people that are watching the same programs," but not "news programs." 5.A.2007–08. See OB.127–28. The government does not address this point.

In short, the government offers speculative excuses for Juror 286's dishonesty after strained parsing of a straightforward inquiry made for the stated purpose of assessing partiality. The questionnaire asked if prospective jurors had "commented on this case." Add.553. But on the government's telling, the questionnaire asked only if prospective jurors had "made formal comments, akin to those in a letter to the editor, about Tsarnaev's legal proceedings." Neither the questionnaire's purpose, nor ordinary English, nor the juror's own usage support this hypertechnical interpretation. Finally, even accepting the government's view of Question 79, the juror still should have disclosed her tweets in response to the catchall Question 97, which asked: "Is there any other matter or any information not otherwise covered by this questionnaire—including anything else in your . . .

knowledge, or beliefs—that would affect your ability to be a fair and impartial juror?" Add.559. Juror 286 answered: "No." Id. Without a doubt, calling Tsarnaev a "piece of garbage" on Twitter was a "matter" or "information" bearing on Juror 286's "ability to be a fair and impartial juror."

b. Juror 286 falsely denied having sheltered in place.

Turn next to Juror 286's second lie: she and her family had not sheltered in place. The government concedes that this sworn statement was "inaccurate." RB.124. But the juror meant no deception, the government says, because during voir dire, she "volunteered that she 'live[d] in Boston, and Boston was on lockdown.'" RB.124 (quoting 5.A.2016). According to the government, that supposed "openness" shows that "whatever the reason for her inaccurate answer in the questionnaire, she was not trying to mislead the court." RB.123–24.

The government sees candor that is not there. Juror 286 never disclosed that she and her family had sheltered in place. Rather, she explained that she arrived at her job 20 miles outside Boston by 6:00 a.m., before the lockdown began. 5.A.2016; see RB.124. While there, the juror said, she "was kind of like joking with my boss I wanted to go home" because "I live in Boston, and Boston was on lockdown." 5.A.2016. Missing from that testimony is the information that the questionnaire sought, and that Juror 286 revealed only in her Twitter post: that she and her "family member[s] . . . were personally affected by the Boston Marathon

bombings" by having been "asked to 'shelter in place' on April 19, 2013." Add.554. Nor did her voir dire responses "put Tsarnaev on notice" that she had sheltered in place. RB.127. Although Dorchester had been on lockdown, Juror 286 never corrected the misstatement that she herself had not.

Worse, what the government touts as Juror 286's "openness" in fact proves her desire to deceive. On Twitter, the juror described feeling fear for her family's safety while she was at work ("it's worse having to work knowing your family is locked down at home!!"), then relief at rejoining them to shelter together ("Finally home locked down w/them #boston"). 25.A.11544. But during voir dire, the juror gave the quite different impression that the lockdown prompted only "joking" and a lighthearted request to leave work early. 5.A.2016. By minimizing the significance of the shelter-in-place order to her, Juror 286 falsely led the Court and the parties to believe that there was no reason to doubt her impartiality.

Instead of engaging with the potent emotional content of Juror 286's contemporaneous tweet, the government doubles down on the revisionist account that she offered during voir dire. "[T]he fact that Juror 286 joked with her boss about the 'lockdown' as an excuse to leave work early," the government says, "suggest[s] that the shelter-in-place order did not seriously affect her ability to serve as an impartial juror." RB.127. This argument ignores the juror's own description of her thoughts and feelings during the lockdown, a time when she had

no reason to dissemble, and substitutes the sanitized version offered at a time when honesty would have led to disqualification from jury service. Juror 286 mischaracterized her emotional state during the lockdown for the same reason that she concealed having been locked down. She worried that telling the truth would have kept her from serving on Tsarnaev's jury, a duty she deemed "probably one of the most important things that I will do in my life." 5.A.2016.

2. Truthful answers would have necessitated dismissal for cause.

Under the legal framework set forth in Sampson II, three factors compel the conclusion that the District Court should have excused Juror 286 for cause: her dishonesty, the manifest bias in her tweets, and the profound impact the lockdown had on her. See 724 F.3d at 163–66; OB.129–36. Each of these factors provided the basis for disqualifying other venirepersons.

a. The government ignores that Juror 286's dishonesty evinces her bias.

The government contends that neither Juror 286's "bombing-related tweets" nor that fact "that she had sheltered in place" would have "justified her dismissal." RB.125–27. This response ignores the juror's dishonesty itself, as well as the fact that other venirepersons were stricken for lack of candor. See OB.130–31 (citing SPA.1.432, SA.197–98 (PJ 16); SPA.7.3764–65, 3.A.1192–94 (PJ 140)).

The ultimate question is bias: whether Juror 286 "lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for

excusal for cause existed)." Sampson II, 724 F.3d at 165–66. In answering that question, Sampson II emphasized that dishonesty matters. For example, among the "relevant" factors "in determining whether a juror has both the capacity and the will to decide the case solely on the evidence," Sampson II listed "the scope and severity of the juror's dishonesty" and "the juror's motive for lying." Id. at 166. Likewise, in concluding that the juror at issue there should have been disqualified, Sampson II relied on her "habitual dissembling." Id. at 167. This Court observed that "jury dishonesty, by itself, . . . can be a powerful indicator of bias." Id. The government agrees. RB.120 (quoting McDonough, 464 U.S. at 556 (Blackmun, J., concurring)). From that premise, Sampson II concluded that a juror's "persistent prevarication supports an inference that [her] ability to perform her sworn duty as an impartial juror was compromised from the start." 724 F.3d at 166.

Similarly, this Court has clarified that "the ultimate inquiry under [Sampson II] requires that the court consider 'the reason behind the juror's dishonesty.'" United States v. French, 904 F.3d 111, 118 (1st Cir. 2018) (quoting Sampson II, 724 F.3d at 165–66). Without analysis or support, the government contends that French "did not establish a categorical rule" demanding investigation of the juror's motive for lying. RB.134. But this Court's case law could not be plainer. Sampson II says that a juror's dishonesty and the reasons for it are "relevant" to the bias analysis, and French says that Sampson II "requires" consideration of the

latter. Moreover, there is no material difference between this case and French. There, as here, a juror gave at least one "inaccurate answer," it was "quite likely—although not certain—that the juror's inaccuracy was knowing," and a correct answer "may well have been quite relevant" to bias. 904 F.3d at 117. In those circumstances, French said, the District Court could not deem the juror unbiased "without knowing why she answered as she did." Id. at 118. The government admits that it does not know why Juror 286 answered the shelter-in-place question incorrectly. See RB.125 ("whatever the reason for her inaccurate answer in the questionnaire"). That admission is fatal to the request for affirmance.[16]

b. Juror 286's tweets and shelter-in-place prove her partiality.

Even on its own terms, the government's argument is mistaken. The government downplays Juror 286's tweets, describing them generically as mere

[16] The government's analytical framework contains a second error. Citing out-of-Circuit cases and the concurring opinions of individual Justices, the government subdivides bias into "'actual bias and . . . implied bias,'" setting forth examples of each. RB.119–20 (quoting United States v. Mitchell, 690 F.3d 137, 142 (3d Cir. 2012)). In Sampson II, this Court found that "categorical delineation unhelpful" and observed that "attempting to classify biases in sub-categories is likely to do more harm than good." 724 F.3d at 165. "[T]he existence vel non of a valid basis for a challenge for cause is not a matter of labels." Id. Instead, this Court conducts a holistic inquiry, asking "'whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed).'" OB.119–20 (quoting Sampson II, 724 F.3d at 165–66).

expressions of "empathy for the victims" or "congratulations due to law enforcement." RB.125–26. But the government misses the posts' specific personal relevance. Juror 286 did not just mourn "the victims," she grieved for Martin Richard, a "Savin Hill little leaguer" from the juror's own small, close-knit Dorchester community. (In fact, she added the hashtag "#Dorchester" to her post. 25.A.11551.) And she did not just congratulate "law enforcement," she praised the officers who arrested Tsarnaev, three of whom testified as trial witnesses for the government. See OB.124. The government's assertion that the latter post—which called Tsarnaev a "piece of garbage"—was "focus[ed] . . . more on the congratulations due to law enforcement than on Tsarnaev" (RB.125–26) rests on nothing but the government's say-so. The post speaks for itself. It both congratulated the officers and expressed loathing for Tsarnaev. To repeat, before being seated, the foreperson of this capital jury had published an online post calling the defendant whom she later voted to sentence to death a "piece of garbage." The government identifies no ruling by any court, anywhere, that such a venireperson is competent to sit in a capital case.

Finally, the government argues that the juror's lockdown was not disqualifying because other qualified jurors had sheltered too, and "not a single prospective juror was stricken for cause on the basis of having sheltered in place." RB.126–27. This contention is incomplete and misleading. In fact, the trauma of

sheltering in place and the lingering aftereffects of that experience prompted the dismissal of many prospective jurors, either for cause or on the parties' agreement.

Venirepersons who sheltered in place were stricken for cause. For example, Juror 76 left work and returned home [redacted] SPA.4.2067. He agreed that having sheltered in place would affect his assessment of the evidence and his deliberations, as the lockdown "contributed to it feeling close to home." 2.A.790. (Like Juror 286, Juror 76 had two young children. See SPA.4.2053; 2.A.792.) And Juror 76 linked that feeling to his disqualifying preference for a death sentence. He agreed that it would be "very difficult" to consider life "with what I know of this case and how close it hits to home." 2.A.797–98. See also id. at 840–41 (granting cause challenge).

Likewise, venirepersons who sheltered in place were excused on the parties' agreement, in circumstances that make clear the significance of the lockdown in rendering those venirepersons unfit for service. Juror 12's family [redacted] SPA.1.331, SPA.1.336. Juror 93, [redacted] SPA.5.2515. Juror 112 [redacted]

[redacted] SPA.6.3019. Juror 371 [redacted] SPA.19.10157. Juror 603 "had my TV on all day on the shelter-in-place day" "because we were concerned we didn't know where he was." 8.A.3531, 3539. She "definitely ha[d] a lot of thoughts and kn[e]w a lot about the events of those days," and could not put those views aside and presume Tsarnaev innocent. 8.A.3542. See 25.A.11448; 3.A.966; 25.A.11449; 8.A.3596 (dismissing these four venirepersons). Juror 286's tweet demonstrates that she belonged to this unqualified group.[17]

Under Sampson II, the "cumulative effect" of all factors relevant to bias "must . . . be considered." 724 F.3d at 166. The government does not identify a single qualified juror who shared all three of Juror 286's disqualifying attributes: dishonesty, heartfelt and vitriolic online comments that lasted for more than a year after the bombings, and the experience of enduring a frightening shelter-in-place.

[17] In contrast, the jurors qualified despite having sheltered in place (RB.126) disclosed that they had done so—unlike Juror 286—and explained that the experience had little effect on them. E.g., 2.A.926–27 (PJ 98) (juror "happened to be working from home, so it didn't actually disrupt my work," and did not "follow the events as they were unfolding"); 3.A.1094 (PJ 129) ("[I]t wouldn't have an impact."); 3.A.1113 (PJ 134) (asked whether shelter-in-place "would . . . have any effect on your fairness or impartiality," juror responds, "I don't think so"); 3.A.1265 (PJ 156) (asked whether shelter-in-place "leave[s] you with any resentment or any other feelings that would interfere with your ability to be a fair judge of the evidence," juror responds, "I don't think so, no").

In light of these three factors, this Court cannot credit the juror's promise of impartiality. See RB.126. "[T]he juror's assurances that [s]he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate 'the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality.'" Murphy, 421 U.S. at 800 (quoting Irvin, 366 U.S. at 723).

B. Juror 138 should have been dismissed for cause.

With respect to Juror 138 too, Tsarnaev satisfies the Sampson II test.

1. Juror 138 answered material questions about his and his friends' Facebook use dishonestly.

Juror 138 gave false responses to questions (whose materiality the government does not contest) on topics that went to the core of his ability to serve impartially: his capacity and willingness to follow the District Court's instructions, and his exposure to extraneous prejudicial influences in this high-profile case. The government begins its defense of Juror 138's dishonesty with another fine-grained dissection of the Court's voir dire questions. See 3.A.1146 ("[L]ast time you were here, I had instructed everyone to avoid any discussion of the subject matter of the case with anybody . . . and also to avoid any exposure to media articles about the case. Have you been able to do that?"). The government accepts that this juror talked about the *case* on Facebook by describing the jury selection process. But, slicing things thinner still, the government contends that he did not discuss "'*the*

subject matter of the case'" because he "merely reported a fact about the jury selection itself." RB.128 (quoting 3.A.1146). As above, the government fails to explain why Juror 138 would have understood the question—aimed at uncovering "exposure" to extrinsic information or influences (3.A.1146)—so narrowly as to exclude prejudicial comments with clear relevance to partiality.

Moreover, the government omits context. Not only did Juror 138 lie in response to material questions, he disobeyed the Court's explicit instructions. The Court invoked the instructions that it had given the juror "last time you were here," (3.A.1146), and those instructions were sweeping. Aside from "tell[ing] others that you may be a juror" and "discuss[ing] the schedule with your family and employer," the venirepersons were told that they "must not communicate about this case or allow anyone to communicate about it with you by . . . Facebook." 1.A.182–83. Thus, the juror was not only prohibited from speaking about the case himself, but was to "avoid any discussion . . . with anybody." 3.A.1146. See also Add.508 ("You may not discuss this case or allow yourself to be exposed to any discussions of this case in any manner."). Those orders required avoiding situations in which others might speak about the case with him. But Juror 138 fostered such an environment. He returned to a Facebook thread where others had already congratulated him for the prospect that he would serve on Tsarnaev's jury ("Did you get picked for the marathon bomber trial!!! ??? That's awesome!") and

revived the thread by updating the participants on jury selection. Predictably, he elicited another comment about the case: "Play the part so u get on the jury then send him to jail where he will be taken care of." 25.A.11537. Far from "avoid[ing] any discussion of the subject matter of the case," Juror 138 courted it.

Turn next to the plainest of Juror 138's lies: the assurance that none of his Facebook friends were "commenting about this trial." 3.A.1148. The government waves away the friends' comments as "flippant and joking remarks . . . which Juror 138 never endorsed." RB.128–29. But the District Court had not asked whether the juror's friends had made serious comments, or whether the juror agreed with them. The Court asked whether the juror's friends had commented about this trial. They had, but Juror 138 said that they had not. Moreover, the government's dismissive characterization of the comments is just that—a characterization, based on nothing but the government's desire to diminish their significance. And the juror did endorse them, in part. In language that the government leaves out (while patting the juror on the back for "trying to follow the court's instructions," RB.130), Juror 138 said that he would lie his way onto a state jury because "them locals tho . . . pishhh ain't no thaang." 25.A.11537. Least persuasive is the assertion that a friend's encouragement to manipulate the voir dire process in order to punish Tsarnaev ("play the part") might not have "amounted to comments 'about this trial.'" RB.129. What else was that friend's suggestion about?

Even if Juror 138 answered incorrectly, the government says, "the evidence does not show that any misstatement rose to the level of knowing dishonesty" because the juror revealed that his family members discussed his jury summons with him and "'were jealous.'" RB.129 (quoting Add.524). This disclosure does not do service for the one that the juror should have made. No one at Juror 138's dinner table told him, as a Facebook friend did, that he should seize the opportunity to sit on the jury and mete out justice to Tsarnaev. Rather, the juror clarified that by "jealous," he meant that his uncle was "more interested in . . . action-type things and . . . excitement, and he'd be more . . . locked in and . . . interested in everything that would be going on." 3.A.1160. And at the time of that dinner, no instruction prevented the juror from discussing the case with others. By contrast, the Facebook discussion took place during jury selection, in direct contravention of the Court's instructions. The juror revealed only communications about this case that did not impugn his fitness, willfully concealing those that did.

Like Juror 286's description of her Twitter use, Juror 138's description of his Facebook use confirms his dishonest purpose. Instead of admitting that he had used Facebook to initiate and carry on a discussion thread about the jury selection process in this case and the prospect that he might be chosen, the juror lied and said that he used Facebook for "personal, social-type things" during down time at work. 3.A.1148. The juror, who worked for the Peabody water department,

elaborated: "We drive around in the city truck. If I'm not driving, I'm sitting in the passenger seat just playing on my phone unless we're working. But other than that, . . . I'm not posting on it or talking to people on it." 3.A.1147–48. Juror 138 can only have meant that incomplete and untrue account to mislead.

2. Truthful answers would have justified dismissal for cause, or at least compelled further questions.

Under Sampson II, three factors warranted dismissal: Juror 138's dishonesty, his unwillingness to follow the District Court's instructions, and his exposure to the prejudicial opinions of his Facebook friends. See OB.139–43.

As with Juror 286, the government truncates the Sampson II analysis by ignoring the first factor, dishonesty, notwithstanding this Court's admonition that the "cumulative effect" of all the relevant factors "must be considered." 724 F.3d at 166. As to the second factor, disobedience, the government concedes that "it might have been best" had Juror 138 not posted his courtroom observations of Tsarnaev, but nonetheless contends that his Facebook comments were "consistent with the court's instructions." RB.130. To the contrary, Juror 138 flouted the Court's instructions in multiple ways, each warranting disqualification.

First, his Facebook comments describing the jury selection process and his impressions of sitting "ten feet infront of" Tsarnaev and the defense team violated unambiguous orders. 25.A.11537. The Court said: "You may tell others that you may be a juror in the case, and you may discuss the schedule with your family and

employer . . . ; however, you are not to discuss anything else, or allow anyone to discuss with you anything else." 1.A.182. Hours after hearing this order, Juror 138 told the public at large (see RB.129) more than the order's plain language allowed. True, the information that he published was not confidential, but the significance of his posts lies in the disobedience itself. As Tsarnaev has shown, and the government has not contested, "'[g]ood cause exists to dismiss a juror when that juror refuses . . . to follow the court's instructions.'" OB.140 (quoting United States v. Oscar, 877 F.3d 1270, 1287 (11th Cir. 2017)). See also United States v. Ebron, 683 F.3d 105, 127 (5th Cir. 2012) (FDPA case) ("A juror's inability to follow instructions is a legally valid basis for dismissal."); OB.179 n.105 (listing dozens of venirepersons excused for inability to follow instructions).

Second, by starting and reviving a Facebook thread about jury selection (indeed, one geotagged at the "John Joseph Moakley United States Courthouse," a location that the juror would have had to choose to add to his post),[18] Juror 138 encouraged others to discuss the case with him. This disregarded a second straightforward order: "[Y]ou must not . . . allow anyone to communicate about [this case] with you by . . . Facebook." 1.A.183. Or, as the questionnaire put it: "If anyone approaches you and attempts to discuss any aspect of . . . the jury selection

[18] See Facebook, How do I check in at a location or add my location to a Facebook post?, https://bit.ly/2lLj8GB.

process, or any aspect of this case, you may not answer their questions or engage in any discussion." Add.508. But that is exactly what the juror did. He entered "'the modern public square,'" OB.132 (quoting Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017)), announced that he was a prospective juror for Tsarnaev's trial, and waited for the comments to roll in. And when they did, Juror 138 responded, keeping the discussion going.[19]

As a fallback, the government says that Juror 138 "was trying to follow the court's instructions." RB.130. Even if so, that is grounds for dismissal, too. If Juror 138 could not understand and comply with these simple directives, he could not be relied on to grasp the hundreds of pages of complex guilt- and penalty-phase instructions to come. See United States v. Vega, 72 F.3d 507, 512 (7th Cir. 1995).

The government contends that disclosure of Juror 138's friends' comments "would not have justified dismissal for cause because they do not indicate that [Juror 138] was prejudiced," as he "did not express those views, nor did he control what comments people would make on his post." RB.129–30. Again, the

[19] The government does not address any of the cases cited by Tsarnaev that uphold the dismissal for cause of jurors who cannot, or do not, follow instructions. See OB.140. United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) (cited at RB.131), lies far afield. In Fumo, after questioning a juror about Facebook posts made during the trial, the trial court concluded that the posts were "harmless ramblings . . . so vague as to be virtually meaningless." Id. at 306. More important, the trial court "found no evidence that [the juror] had been contacted regarding the posts." Id.

government fails to grapple with the juror's dishonest failure to disclose the communications themselves. Moreover, the government does not address Tsarnaev's point that *ex parte* communications concerning the case are prejudicial unless proved harmless. See OB.142–43 (quoting United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992)). Where, as here, "unsequestered jurors" have "communication outside the courtroom with persons not connected with the case," and "it is shown that there was a communication about the case," that interaction "would be deemed prejudicial unless shown to be harmless." 972 F.2d at 14. See also United States v. Wright, 937 F.3d 8, 21 (1st Cir. 2019) (same). Because the juror never disclosed the communication, the District Court had no grounds to conclude, and the government cannot argue, that he was unaffected.

C. This Court should vacate Tsarnaev's convictions or death sentences on the current record; at a minimum, this Court should remand for further proceedings.

1. The current record suffices for vacatur.

Tsarnaev has shown that both Jurors 286 and 138 "lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed)." Sampson II, 724 F.3d at 165–66. Because "the presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error," French, 904 F.3d at 120, this Court should vacate Tsarnaev's convictions or, under Eighth Amendment principles, his death

sentences. See OB.147 (citing French, 904 F.3d at 120, and Sampson II, 724 F.3d at 163). As set forth above, ante §§ II.A and II.B, the current record supplies a sufficient basis to determine that both jurors suffered from disqualifying bias.

Contrary to the government's contention (RB.135 n.33), the District Court's deficient inquiry also provides a basis for this Court to order a new trial or penalty phase. United States v. Zimny, 846 F.3d 458, 471 (1st Cir. 2017) ("[W]e could vacate [Zimny's] conviction and require a new trial in light of the district court's failure to conduct an investigation into the allegation of juror misconduct."). Indeed, "'[d]ue process means . . . a trial judge ever watchful . . . to determine the effect of [prejudicial] occurrences when they happen,'" and a District Court's "failure to conduct a sufficient inquiry clearly deprive[s] [defendants] of this right, and therefore requires that their convictions be vacated." United States v. Gaston-Brito, 64 F.3d 11, 13–14 (1st Cir. 1995) (quoting Smith, 455 U.S. at 212). See United States v. Bristol-Martir, 570 F.3d 29, 43–44 (1st Cir. 2009) (ordering new trial where deficient inquiry into misconduct "compromised the defendants' rights to have a trial by an unbiased jury").

Here, several considerations counsel in favor of vacatur rather than remand. Jury selection took place in January and February 2015, almost five years ago. See United States v. Rhodes, 556 F.2d 599, 602 (1st Cir. 1977) ("[P]artly because so much time has gone by since the discharge of the jury, we feel it would be best for

the court to set aside the verdicts and grant defendants a new trial."). Both Juror 286 and Juror 138 would have strong, perhaps insurmountable, incentives to deny having answered dishonestly and to insist on their impartiality. An admission of prior perjury would give rise to potential criminal liability. Social media posts from the day of Tsarnaev's sentencing reflect that both would want to insulate the verdict from challenge. That day, Juror 286 changed her Facebook profile picture to an image bearing the "Boston Strong" slogan. 25.A.11625. A few weeks later, in response to a news report that Tsarnaev had moved for a new trial, she tweeted:

DE.1509, Exh. B; see 25.A.11621. Similarly, on the day of sentencing, Juror 138 announced that Tsarnaev is "[s]cum" and "trash" who belongs in a "dungeon where he will be forgotten about until his time comes." See OB.117–18 (quoting 25.A.11624). If the jurors lied during voir dire, it strains plausibility to think that

either would so admit now, when truthfulness would result in vacatur of the death sentence that both believe should stand.

Finally, Tsarnaev presented these challenges during jury selection, so his claim asserts a voir dire inadequate to secure his Fifth, Sixth, and Eighth Amendment rights to an impartial jury and a reliable penalty. In general, inadequate voir dire results in vacatur, not remand. E.g., Morgan v. Illinois, 504 U.S. 719, 739 (1992); Turner v. Murray, 476 U.S. 28, 37 (1986); see post Point IV.

Tsarnaev acknowledges that both Zimny and French remanded rather than vacated. But in Zimny, it was uncertain whether the jurors had committed the alleged misconduct (viewing derogatory comments about the defendant on a blog and engaging in premature deliberations). See 846 F.3d at 472 ("[A]n adequate inquiry might reveal that the alleged juror misconduct did not occur in the first place."). And in French, it was unknown whether the information that the juror failed to disclose (her son's marijuana trafficking convictions) would have biased her against the defendant, himself accused of marijuana trafficking, or the government, which had prosecuted her son. Compare 904 F.3d at 117 ("The mother of a drug user arrested for dealing to support his drug habit might have some strong thoughts about those who produce the drugs.") with id. ("Perhaps . . . her son's prosecution had left her hostile toward government prosecutors.").

Here, we know from her own contemporaneous words that Juror 286 felt deep animus for Tsarnaev, whom she called a "piece of garbage," and that she suffered emotional trauma during the shelter-in-place. That is, the juror has voiced actual bias and endured a disqualifying experience. Nothing that might emerge at any future evidentiary hearing on remand would change those facts. Put differently, even if the government succeeded in proving that Juror 286 merely misunderstood the questions, so that she answered mistakenly but not dishonestly, dismissal would still be warranted under Sampson II for the juror's "flagrant" bias. 724 F.3d at 165–66 n.8.

2. In the alternative, this Court should remand.

At a minimum, Tsarnaev has made a "colorable or plausible claim of juror misconduct" sufficient to trigger the District Court's "'unflagging duty'" to investigate. Zimny, 846 F.3d at 464 (quoting United States v. Paniagua-Ramos, 251 F.3d 242, 250 (1st Cir. 2001)). To obtain remand, Tsarnaev need not prove that Jurors 286 and 138 knowingly gave false testimony, and need not disprove the government's innocent explanations for the jurors' answers. To secure a "court-supervised investigation" into a juror's dishonesty, a defendant "need not show at the outset that [his] claim is so strong as to render contrary conclusions implausible." French, 904 F.3d at 117. Because the Court made no inquiry at all, even though both jurors were in the courthouse and neither had been sworn, this

Court must at least remand for further proceedings. See French, 904 F.3d at 120; Zimny, 846 F.3d at 470–72.

At the threshold, the government misstates the standard of review, arguing that Tsarnaev "requested further voir dire only with respect to Juror 286," so that "his claim that the court should have questioned Juror 138 further is reviewed for plain error." RB.118; see also RB.132 (same). The government has the facts wrong. Although Tsarnaev's initial motion (Add.469–71) sought only to strike Juror 138, Tsarnaev's reply sought further voir dire of all seven of the venirepersons he challenged for cause, including Juror 138. 25.A.11556 ("[T]he Court should allow the pending challenges to seven jurors or, in the alternative, permit further questioning of them."). See also 25.A.11554 ("[T]he motions seek to have the jurors struck or, *in the alternative*, *questioned further*."). The District Court understood and denied that request, refusing to "reopen the voir dire" of any of the seven. Add.322. Plain-error review is therefore inapplicable.

On the merits, the government defends the sufficiency of the District Court's investigation by observing that the Court, "[b]efore ruling on Tsarnaev's motions to disqualify multiple jurors, . . . 'reviewed the jury questionnaires,' 'reviewed the transcripts,' and 'considered the objections.'" RB.133 (quoting Add.321–22). The government made the same point in French. See Br. for United States 43, United States v. French, No. 16–2392 (1st Cir. Apr. 20, 2018) (noting trial court's

"painstaking review of the relevant transcripts, the parties' multiple pleadings and supporting materials, and thoughtful deliberation"), available at 2018 WL 2096104. This Court disagreed. Once French showed that a juror gave an inaccurate answer, likely (but not certainly) knowingly, to a material voir dire question, a more searching inquiry than a mere review of the transcript and moving papers became obligatory. 904 F.3d at 117. See ante § II.A.2.a.

Similarly, the government deems "reasonable" the District Court's decision to "g[i]ve the parties seven days to review the jury questionnaires once they were completed," then to "conduct[] 21 days of individual voir dire during which the defense had ample opportunity to ask about publicly available social media posts and to make oral motions to strike." RB.135 (citing Paniagua-Ramos, 251 F.3d at 249). (But recall that the Court had denied the defense's request to order the venirepersons to disclose their social media screen names, making discovery of Juror 286's Twitter posts far more difficult. OB.156–57.) In any event, the issue is not the reasonableness of the initial voir dire. Rather, it is whether the District Court, once confronted with Tsarnaev's claims, discharged its "primary obligation . . . to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." United States v. Boylan, 898 F.2d 230, 258 (1st Cir. 1990); see French, 904 F.3d at 117 (same).

On that score, the Court fell short. The Court asked no questions, allowed no additional voir dire, and made no particularized findings. This inaction exceeded the scope of the Court's discretion. "A district 'judge does not have discretion to refuse to conduct any inquiry at all regarding the magnitude of the taint-producing event and the extent of the resulting prejudice' if confronted with a colorable claim of juror misconduct." Zimny, 846 F.3d at 465 (quoting United States v. Lara-Ramirez, 519 F.3d 76, 87 (1st Cir. 2008)).

In light of that firm, oft-repeated rule, it is no surprise that the government identifies no case upholding as reasonable an inquiry into juror misconduct in which the trial court did not at least question the implicated juror. E.g., United States v. Rodriguez, 675 F.3d 48, 61 (1st Cir. 2012) ("[T]he district court held a hearing at which the foreperson, under oath, testified."); Paniagua-Ramos, 251 F.3d at 249 ("The judge questioned each former juror individually, under oath."); Boylan, 898 F.2d at 259 ("All jurors and alternates were interviewed individually.") (all cited at RB.133). In contrast, Tsarnaev has cited multiple precedential decisions from this Court holding investigations inadequate where no such questioning occurred. E.g., French, 904 F.3d at 116–20; Zimny, 846 F.3d at 467–70; Gaston-Brito, 64 F.3d at 13; Rhodes, 556 F.2d at 601–02 (all cited at OB.149). Settled precedent precludes affirmance. Moreover, these cases concerned mid- or post-trial claims of misconduct. Tsarnaev presented his claim

during voir dire. The District Court abused its discretion by disregarding evidence of significant misconduct by two prospective jurors without asking either of them a single follow-up question, notwithstanding their ready availability.[20]

[20] In a half-sentence, the government embraces the District Court's alternative timeliness ruling, but offers no further analysis. RB.135 ("The district court properly concluded that these challenges were untimely."). In the face of Tsarnaev's extensive demonstration of diligence and timeliness, OB.152–60, the government's failure to brief this issue constitutes waiver. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived."); Caraballo-Cruz, 52 F.3d at 393 (Zannino "applies with undiminished vigor when, as now, a prosecutor attempts to rely on fleeting references to unsubstantiated conclusions in lieu of structured argumentation"). The government has not even tried to refute Tsarnaev's argument on this point.

III.

The District Court's Dismissal Of Juror 355 Violated The Sixth Amendment Under *Witherspoon*.

Again and again, Juror 355 affirmed that he could honor his oath, follow the District Court's instructions, and vote to impose the death penalty in an appropriate, albeit rare, case. The law requires no more. "[I]f prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out." Adams v. Texas, 448 U.S. 38, 48 (1980) (quoting Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968)). The government mischaracterizes the juror's sustained self-examination as "hesitan[cy]" and his careful, considered, answers as "hedged," then asserts, inaccurately, that the juror "refused to answer hypothetical questions." And the government maintains that Juror 355's inability to furnish examples of death-appropriate cases without hearing facts or instructions implied that the juror could impose death only in cases of genocide. In fact, the juror said the opposite.

A. Juror 355 was competent to serve.

The government first contends that Juror 355 "evinced significant hesitation regarding the death penalty," citing this exchange:

> THE COURT: So can you envision there could be a case where you could vote in favor of the death penalty?

THE JUROR: After a lot of thought and soul-searching, I *think* I could. RB.148–49 (quoting 6.A.2448) (emphasis in RB). The verb "think" offers no grounds to doubt the juror's competence. The Supreme Court has deemed a venireperson who gave this exact answer "clearly qualified." Gray v. Mississippi, 481 U.S. 648, 653 n.5, 659 (1987). Nor does "soul-searching," which manifested not reluctance but careful deliberation, a desirable attribute in any juror. He explained: "[W]hen I found out I was going to be in this pool, I did a lot of soul-searching, and I came to the conclusion that . . . I believe it should be in the most rarest of situations, . . . but I could foresee situations where I might consider it appropriate." 6.A.2448. The juror did not hem, haw, hedge, or hesitate during voir dire. An educated professional, he came to court having engaged in sustained reflection and arrived at a "confident," stable, conclusion. 6.A.2459. A venireperson states the obvious, and remains competent to serve, when he acknowledges that "the potentially lethal consequences of [his] decision would invest [his] deliberations with greater seriousness and gravity." Adams, 448 U.S. at 49. Juror 355's thoughtfulness entitles his self-assessment to more weight, not less.

The government suggests that these qualified responses were "'isolated statements.'" RB.149 (quoting Morales v. Mitchell, 507 F.3d 916, 941 (6th Cir.

2007)). In fact, from his questionnaire through voir dire, the juror gave consistent, satisfactory answers regarding his ability to follow the Court's instructions:

- "I am opposed to the death penalty but I could vote to impose it if I believed that the facts and law in a particular case called for it." SAdd.71; see also 6.A.2448 (same).

- "If, after hearing the Court's instructions, and if I believed . . . it fit into one of those rare cases where I believed the death penalty should be imposed, having understood the law as given to me, then, yes, I could vote to impose the death penalty." 6.A.2451.

- The juror agreed that he "would be able to" "consider the aggravating factors presented by the government, the mitigating factors presented by the defense, deliberate about them, weigh them, and come to [his] own individual judgment[] about whether that justifies a sentence of death." 6.A.2458–59.

- The juror agreed that he "would then be able to deliberate and debate the pros and cons of imposing a sentence of life or death." 6.A.2459.

- To the question "[I]f in your conscience, your individual conscience, you decided that the death penalty was an appropriate sentence for the given set of facts, . . . could you then actually vote to impose it?" the juror answered: "I think I could." He was "pretty confident of that answer." Id.[21]

Juror 355 gave qualifying answer after qualifying answer, all the product of careful, sober, reflection, and all conclusive evidence of his fitness to serve.

[21] That last answer is not less probative because it came in response to defense counsel's question. See RB.149. Rehabilitation is a proper purpose of voir dire. See, e.g., Wainwright v. Witt, 469 U.S. 412, 430–31 (1985).

Next, the government takes aim at the juror's unwillingness to answer hypotheticals that required him to assume Tsarnaev's guilt, contending that his "resistance" could reasonably have led the District Court "to question whether he 'was going to be truly open' to imposing the death penalty." RB.149–50 (quoting 6.A.2506). But the Court did not in fact question the juror's openness on this ground, see 6.A.2505–06, no doubt because the juror had already answered a "generalize[d]" hypothetical, posed by the Court, which removed the problematic assumption. 6.A.2451 ("If you were sitting on a death penalty case . . . and the defendant is found guilty of a capital crime, and you concluded that for that defendant and for that crime the death penalty was an appropriate punishment, could you conscientiously vote to impose it in that case?"). Juror 355's answer was neither "hedged" nor "tautological." RB.150. It was straightforward and aligned with his earlier answers: if the case presented one of the "rare" situations that so warranted, "then yes, I could vote to impose the death penalty." 6.A.2451.

The government notes Juror 355's "inability to identify any cases beyond genocide in which he considered the death penalty appropriate." RB.150. And the government collects cases "uph[olding] the exclusion of jurors who, like Juror 355, are unable to identify situations in which they could impose the death penalty beyond particularly severe crimes such as genocide." RB.151. The argument is misdirected. These cases concern venirepersons who could vote to impose the

death penalty only in circumstances not present in the trials for which they were summonsed.[22] A trial court may discharge such venirepersons for cause. See OB.203 (citing United States v. Flores, 63 F.3d 1342, 1356 (5th Cir. 1995)).

But Juror 355 did not belong to this barred class. He affirmed that genocide served only as a "starting point," an "example" of a "scenario" that he could "immediately" deem suitable for the death penalty "without knowing specifics"—without learning anything else about the facts or hearing the District Court's legal instructions. 6.A.2451; 6.A.2453. In the mine run of cases, the juror said that he would "have to listen to the Court's instructions, . . . judge the facts in front of me and determine whether or not that satisfied me." 6.A.2452. This attitude was prudent and sound. The Court qualified other jurors who said that they would do likewise. E.g., 1.A.427 ("It would depend on what was shown in court and what

[22] E.g., United States v. Rodriguez, 581 F.3d 775, 793 (8th Cir. 2009) ("Venireperson G.B. repeatedly affirmed his deeply-held moral opposition to the death penalty, providing exceptions only for politically-motivated and serial killer cases."); United States v. Fields, 516 F.3d 923, 937–38 (10th Cir. 2008) ("[A]side from the exception drawn for genocide, torture, and willful killing of children, the potential juror would balk at a death sentence unless the law left him no discretion but mandated that it be imposed."); Morales v. Mitchell, 507 F.3d at 942 ("[T]he few circumstances under which Juror B indicated that he might be able to impose the death penalty," namely, "mass murder or torture," "did not include the circumstances of the murder with which Morales was charged."). The basis for disqualification in United States v. Fell was not the juror's inability to identify examples of death-appropriate cases, but her acknowledgement that she would "lean unfairly" "more towards life imprisonment than I would towards the death sentence." 531 F.3d 197, 212–13 (2d Cir. 2008).

your instructions were."); 6.A.2474 ("I would have to give the penalty . . . after the instructions from the judge, I would follow the instructions from the judge.").

Juror 355 many times opined that only "rare" cases justify the death penalty, and the government dutifully gathers these statements. RB.151 (citing SAdd.70; SAdd.72; 6.A.2458; 6.A.2451). But Juror 355's views correspond to modern Eighth Amendment jurisprudence. "Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)). The death penalty "is an extreme sanction, suitable to the most extreme of crimes." Gregg v. Georgia, 428 U.S. 153, 187 (1976) (Stewart, Powell, and Stevens, JJ.). Beliefs that state controlling law do not call for dismissal.

B. This Court should not defer to the District Court's contrary ruling.

In striking Juror 355, the District Court made factual and legal errors. One could treat these errors as triggering the exceptions to deference recognized in Uttecht v. Brown, 551 U.S. 1, 20 (2007), and Gray, 481 U.S. at 661 n.10. See OB.172. Or, one could apply the ordinary abuse-of-discretion standard (see United States v. Sampson, 486 F.3d 13, 39 (1st Cir. 2007) ("Sampson I")), which is overcome by clearly erroneous findings of fact or errors of law. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); Koon v. United States, 518 U.S. 81,

100 (1996). Both paths lead to the same place, and Tsarnaev prevails under either approach. This Court should not accept the finding of substantial impairment.

1. A single *Witherspoon* error violates the Sixth Amendment, and the remedy dictated by precedent—vacatur of the death sentence—has no bearing on the level of deference due.

The government agrees that abuse-of-discretion review applies, and that a trial court's ruling on a Witt challenge receives deference. RB.140. But the government goes on to obscure that simple standard with several assertions, all doctrinally unsupported, that invite this Court to rewrite precedent and engage in outcome-driven analysis. RB.140–42. These incorrect assertions merit reply.

For example, the government contends that "[t]he case for deference is particularly strong" in this context "because the risk of actual constitutional harm flowing from a single Witherspoon error is low." RB.141. A single such error "does not suggest that the defendant has been deprived of an impartial jury," the government says, as long as "an equally qualified juror will take the excluded juror's place." RB.142. The Supreme Court has twice rejected this argument. Gray, 481 U.S. at 666 (dismissing as "unavailing" "[t]he State's argument that the erroneous exclusion of [the venireperson] was a single technical error that should be considered harmless because it did not have any prejudicial effect"); Davis v. Georgia, 429 U.S. 122, 122–23 (1976) (per curiam) (reversing Georgia Supreme Court's holding that "the erroneous exclusion of one death-scrupled juror did not

deny the [defendant] a jury representing a cross section of the community since other jurors sharing that attitude were not excused for cause"). Thus, the suggestion that a Witherspoon error poses little risk of "actual constitutional harm" (RB.141) is mistaken. A Witherspoon violation itself offends the Sixth Amendment. "Capital defendants have the right to be sentenced by an impartial jury," and the government "infringe[s] this right by eliminating from the venire those whose scruples against the death penalty would not substantially impair the performance of their duties." Brown, 551 U.S. at 22.

The government errs by focusing on the petit jury instead of the venire. Discharging qualified venirepersons contravenes the Sixth Amendment not by placing partial persons on the petit jury, but by skewing the pool from which the petit jury comes. Even a single erroneous Witherspoon dismissal has that impermissible effect. Excusal of a qualified juror "unnecessarily narrows the cross section of venire members" and "'stack[s] the deck against the [defendant]'" by biasing the pool of potential jurors toward death. Gray, 481 U.S. at 659 (quoting Witherspoon, 391 U.S. at 523). Tsarnaev had "the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause." Brown, 551 U.S. at 9.[23]

[23] Even the petit jury was not as neutral as the government suggests. See RB.153. On the questionnaire's scale of 1–10, the petit jurors' mean self-assessment was pro-death (5.8 out of 10). See 26.A.11706; 26.A.11734; 26.A.11762; 26.A.11790;

The dismissal of Juror 355 was no aberration. It was the unconstitutional culmination of the government's thoroughgoing and successful campaign to disqualify and peremptorily strike those venirepersons who expressed opposition or uncertainty regarding the death penalty. See OB.179–80 & nn.105–06 (identifying 45 such venirepersons). Far from "beside the point," RB.152, this tally confirms the systematic distortion of the venire from which Tsarnaev's jury came. See Gray, 481 U.S. at 667–68, 671 (plurality op.) (refusing to treat Witherspoon error "as an isolated incident having no prejudicial effect" where prosecution "exercised its peremptory challenges to remove all venire members who expressed any degree of hesitation against the death penalty").

The government's most fundamental misstatement is the argument, unsupported by any authority, that "the deferential standard is particularly appropriate" because "the institutional cost of finding a Witherspoon error is so high." RB.142. This is a bald request for result-oriented judging. This Court should reject the government's invitation to dilute the substantive Sixth Amendment right explicated in Witherspoon, Adams, and Gray. Instead, applying

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Add.528; 26.A.11818; Add.556; 26.A.11846; 26.A.11874; 26.A.11902; 26.A.11930; 26.A.11958. Three petit jurors scored themselves strongly pro-death (Jurors 441, 480, and 138, who ranked themselves 7, 7, and 8, see 26.A.11902; 26.A.11930; Add.528), but none scored themselves strongly pro-life. This orientation hardly reflects the "conscience of [a] community" where, the government agrees, "'most residents . . . oppose[] capital punishment.'" RB.152 (quoting OB.179). See Witherspoon, 391 U.S. at 519.

the settled standard of review set forth above, this Court should ask whether the District Court made clear factual or legal errors in discharging Juror 355.

2. The District Court's ruling that Juror 355 was substantially impaired is entitled to no deference because it was based on the clearly erroneous factual finding that his "zone of possibility" was limited to "genocide."

The District Court concluded that Juror 355 was "substantially impaired" after finding that his "zone of possibility" was limited to "genocide" and was therefore too "narrow." 6.A.2505. The voir dire offered "no basis" for that finding, Brown, 551 U.S. at 20 (or, put differently, that finding constituted "a clearly erroneous assessment of the evidence," Cooter & Gell, 496 U.S. at 405). The government now insists that the Court "knew from Juror 355's answers that genocide was a 'starting point,' not necessarily the 'ending point.'" RB.151 (quoting OB.161, 176). But the Court's actual ruling nowhere demonstrates such knowledge. Instead, the Court determined that Juror 355 was not "open to the possibility of the death penalty" because he had not given "examples" of death-appropriate cases that were "possible . . . in the world that we'll be operating in." 6.A.2505. This ruling rested on the premise—contradicted by the record—that Juror 355 would not endorse capital punishment in other circumstances.

The government retreats to Brown's general observation that a trial court enjoys "'broad discretion'" if the court "'has supervised a diligent and thoughtful voir dire.'" RB.143 (quoting 551 U.S. at 20). Tsarnaev disputes that the voir dire

here met that standard. E.g., Point II (failure to investigate juror bias, dishonesty, and misconduct); Point IV (failure to ask questions concerning mitigation impairment and pretrial publicity). But there is no need to resolve that question for purposes of Tsarnaev's Witherspoon claim. The government does not argue that diligence in the selection of other jurors permitted the District Court to make basic factual errors in discharging Juror 355. But that is what happened: the Court turned the juror's answer upside down. Juror 355 said that genocide was a "starting point" for the universe of cases in which he could vote to impose the death penalty, but the Court treated that offense as the outer boundary of the juror's "zone of possibility." The rest of the voir dire, no matter how circumspect, does not rehabilitate that finding.

3. The District Court's legal error and inconsistency—refusing to qualify Juror 355 because he could not offer examples of death-appropriate cases, while approving pro-death venirepersons who exhibited the same attribute—likewise precludes this Court from deferring.

Under Gray, "deference is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, and are internally inconsistent." 481 U.S. at 661 n.10. Here, the finding that Juror 355 was substantially impaired suffered from legal error and inconsistency. The Court required the juror to tender multiple examples of cases in which he would vote for

the death penalty, even though pro-death venirepersons had not given corresponding examples of cases in which they would vote for life. 6.A.2505–06.

Juror 355 swore that he could listen to the evidence, follow the Court's instructions, deliberate, weigh aggravating and mitigating factors, and vote to impose a death sentence. He even provided one "prime example" of a case where he could "immediately" agree, before engaging in that deliberative process, that a defendant would merit death. Nothing in Witherspoon, Witt, or any other case required Juror 355 to supply more. A prospective juror cannot even "be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." Witherspoon, 391 U.S. at 522 n.21. Still less need he imagine how he would vote in other cases. Placing that supplemental burden on a juror does not comport with Witt's admonition that "it is the adversary seeking exclusion who must demonstrate . . . that the potential juror lacks impartiality." 469 U.S. at 423. Whether treated as a "misapplication of federal law," Gray, 481 U.S. at 661 n.10, or an "error of law" amounting to an abuse of discretion, Koon, 518 U.S. at 100, that misstep disentitles the Court's ruling to deference.

The government disputes Gray's relevance, contending that here, the Court "applied the correct standard and found as a matter of fact that Juror 355 did not meet that standard because he was impaired in his ability to impose the death penalty." RB.143–44. The Court erred not by misstating the Witt standard, but by

exacting more proof of competence than the law contemplates. Rogers v. Richmond, cited in Gray's footnote 10, explains the ramifications of such an error: "[F]indings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for. Historical facts 'found' in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions." 365 U.S. 735, 743 (1961).

Under Gray, deference is also "inappropriate where, as here, the trial court's findings . . . are internally inconsistent." 481 U.S. at 661 n.10. As Tsarnaev has shown, the District Court applied inconsistent prerequisites to different venirepersons. For example, the Court demanded multiple examples of death-appropriate cases from Juror 355, but no parallel examples of life-appropriate cases from Juror 260. OB.178–79. Asked to describe the "circumstances" where the death penalty "would not be appropriate," Juror 260 could muster no specifics, and instead responded: "The outline you gave of how to make the decision of aggravating and mitigating factors seems a reasonable one to me, and I would want to hear what, in fact, they have done." 5.A.1932–33.

The government minimizes the disparity, arguing that Juror 260 was more "open-minded" than Juror 355. RB.148. Not so far as their answers reveal. [redacted] SPA.13.7107. [redacted]

[redacted] SPA.13.7109. Juror 260 could not give any examples of cases unbefitting death. His answer—that he would await the facts and the Court's instructions—reflected just as much openness as Juror 355's. See 6.A.2452 (Juror 355) ("I'd have to listen to the Court's instructions, I would have to judge the facts in front of me.").

As to Juror 355 alone, the District Court sought, in addition to a promise to heed the Court's instructions, confirmatory examples proving the juror's capacity to impose a death sentence. Tsarnaev asserts no mere gripe "with the district court's factual findings regarding specific jurors." RB.148. Rather, Tsarnaev has identified a pro-death bias in the Court's interpretation and application of the Witt standard. That slant, which manifested in the disparate and unfavorable treatment of Juror 355, precludes this Court from deferring.

IV.

The District Court Precluded Voir Dire Questions Essential To Seating Impartial Jurors.

Voir dire was deficient in two key respects. First, the District Court contravened Morgan v. Illinois, 504 U.S. 719 (1992), by refusing to ask prospective jurors whether they could consider mitigating evidence and vote to impose a life sentence not just in the abstract, but in the specific factual circumstances of this case. Second, the Court disregarded this Court's explicit directive in Patriarca v. United States, 402 F.2d 314 (1st Cir. 1968), to investigate the contents of any pretrial publicity that the venirepersons had seen.

In response, the government argues that Morgan was satisfied when the prospective jurors, apprised of the basic facts of this case, gave acceptable answers to general questions about their ability to vote for a life sentence. And the government says that Patriarca announced no binding rule at all. The government is wrong on both counts. Morgan stands for the principle that general voir dire does not suffice to identify and disqualify mitigation-impaired venirepersons. The District Court could not eschew focused, case-specific voir dire by assuming that the prospective jurors would have this case's facts "in their minds" when answering abstract and general queries. Patriarca relied on this Court's supervisory authority to set "the standards of this circuit" for voir dire in high-profile cases. United States v. Medina, 761 F.2d 12, 20 (1st Cir. 1985). The

District Court lacked discretion to abdicate to the venirepersons the duty to evaluate whether the publicity they had seen had compromised their impartiality. Vest, 842 F.2d at 1332; Rhodes, 556 F.2d at 601.

A. The District Court's refusal to pose case-specific *Morgan* questions violated the Sixth and Eighth Amendments.

The government does not dispute that a juror who would automatically vote to impose the death penalty for a particular defendant's crime, without considering mitigating evidence, is unqualified. See OB.199–200. The government also agrees that Tsarnaev was "entitled to an inquiry sufficient to 'discern[] those jurors who . . . had predetermined the terminating issue of his trial, that being whether to impose the death penalty.'" RB.159 (quoting Morgan, 504 U.S. at 736). And the government concedes that Tsarnaev proposed, but the District Court refused to ask, an "arguably proper" voir dire question designed to identify such jurors: "'If you were convinced beyond a reasonable doubt that the defendant killed a child by deliberately using a weapon of mass destruction, would you automatically vote for the death penalty without regard to any mitigating circumstances (such as, for example, the defendant's youth, or his family background and relationships)?'" RB.169 n.40 (quoting Add.449). The question for this Court is therefore narrow: Did it suffice for the District Court, instead of posing the defense-proposed question, to ask the prospective jurors general questions about their capacity to vote for a life sentence, while assuming that they would "have" the "specifics" of

Tsarnaev's case "in their minds" when answering? Add.121. It did not. The Sixth and Eighth Amendments demanded much more.

1. Informing the jurors of case-specific facts but asking them only general voir dire questions did not eliminate the risk that mitigation-impaired jurors sat.

Ham v. South Carolina, 409 U.S. 524 (1973), establishes that "a venireperson's awareness of facts which could give rise to potential bias, coupled with general questions about bias, do not obviate a particularized investigation into prejudice." OB.212–13. In Ham, the Supreme Court reversed a state criminal conviction for failure to allow voir dire on racial prejudice, even though the venirepersons (i) knew that the defendant was African-American; and (ii) answered general questions about prejudice. Indeed, the state's lead argument for affirmance there, rejected by a unanimous Court, was that specific voir dire was redundant because the venirepersons knew the defendant's race and had given general assurances of fairness. Br. for Resp. 4, Ham v. South Carolina, 409 U.S. 524 (No. 71–5139) (Apr. 27, 1972), available at 1972 WL 135829.

The government responds that "Ham never addressed the state's argument that a general question was sufficient, and there is no reason to extrapolate a broad rule, applicable in other contexts, from the Court's implicit rejection of that argument." RB.171–72. Ham necessarily rejected the state's argument, and moreover, took pains to note that the trial court had asked "general questions"

regarding bias. 409 U.S. at 526; see id. n.3 ("Are you conscious of any bias or prejudice against him?" "Can you give . . . the defendant a fair and impartial trial?"). Ham nonetheless held that the Due Process Clause "required the judge in this case to interrogate the jurors upon the subject of racial prejudice" in particular. Id. at 527. The basis for that holding, where the venirepersons knew the defendant's race and answered general bias questions, was the conclusion that specific inquiry was necessary "to focus the attention of prospective jurors on any racial prejudice they might entertain." Id. Just as it was necessary to "focus" Ham's venire on racial prejudice with targeted questions, it was essential to confront Tsarnaev's venire with specific offense elements (using a weapon of mass destruction) and aggravating circumstances (killing a child) that may have compromised jurors' ability to consider mitigating evidence.

Next, the government observes that Ham "dealt . . . with racial prejudice," and "did not suggest that specific questioning was required for every type of prejudice." RB.172. Indeed, the government says, "subsequent cases" have limited Ham and "clarified that specific questions about racial bias are required only" in certain circumstances, such as violent interracial crimes. RB.172. Tsarnaev relies not on Ham's holding but on its reasoning, namely, the proposition that general "fairness" questions do not substitute for particularized inquiry where the threat of prejudice from a case's inflammatory facts looms large. It is

immaterial that Ham "held that the defendant was *not* entitled to ask whether jurors were prejudiced by 'the fact that [the defendant] wore a beard.'" RB.172 (quoting 409 U.S. at 527). Ham declined to require questioning about the defendant's beard not because the jurors knew that he wore one, but because bias against the bearded did not pose the same constitutional concern as bias against African-Americans. 409 U.S. at 527–28. Here, Tsarnaev sought to investigate the venirepersons' mitigation impairment. Jurors' deep-seated bias against Tsarnaev—their unwillingness to fairly consider extending mercy to the killer of a child, by the intentional detonation of a bomb—is far more similar to racial bias, and far more problematic, than bias against facial hair. Morgan establishes that the Constitution does compel inquiry into this form of partiality. 504 U.S. at 736.

Consistent with Ham's reasoning, courts have held that implementing Morgan requires case-specific questioning, at least in cases involving crimes so egregious that venirepersons might find themselves unable to consider a penalty less severe than death. See OB.206–09. As these courts explain, "[t]he entire premise of the Morgan decision is that highly general questions may not be adequate to detect specific forms of juror bias." United States v. Fell, 372 F. Supp. 2d 766, 769 (D. Vt. 2005). Instead, "either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them

not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." People v. Cash, 50 P.3d 332, 341 (Cal. 2002). And judicial experience confirms "the ineffectiveness of purely 'abstract' questions," in aggravated cases, "to probe . . . whether or not a juror would be able to fulfill his or her duty to give fair consideration to both life and death sentences no matter what the facts are." United States v. Johnson, 366 F. Supp. 2d 822, 847–48 (N.D. Iowa 2005).

But here, "highly general" and "purely 'abstract'" questions about the death penalty were all that the District Court asked.[24] The government relies on the questionnaires to argue that the seated jurors "had open minds." RB.173–74. But the questions that the government cites did not investigate the ability of jurors to consider and give practical effect to mitigating evidence in the factual context of this case. Question 77 concerned pretrial publicity, not mitigation impairment. Add.525 ("As a result of what you have seen or read in the news media, . . . have you formed an opinion . . . that Dzhokhar Tsarnaev should receive the death penalty?"). Several venirepersons answered "unsure" or "no" because they preferred to await the presentation of evidence at trial, rather than "form[ing] an

[24] Tsarnaev concedes that the questionnaire's factual summary disclosed most of the aggravating facts on which he sought voir dire. See OB.189–90 n.107 (citing Add.526); RB.162–63. But not every venireperson who read the summary absorbed it. E.g., 3.A.1317 (PJ 161) (stating, during voir dire: "I was not aware that there was a child involved.").

opinion" based on media coverage. E.g., 2.A.502–03 (PJ 35); 3.A.1151 (PJ 138); 4.A.1662–63 (PJ 229). Question 77 did not, as the government suggests (RB.173–74), ask the prospective jurors what their views would be if the facts reported in the media were proved in court.

Question 88 asked for the prospective jurors' "views on the death penalty in general," and Question 89 asked them to rank their "opinion about the death penalty" on a 1–10 scale. Add.528. Per the District Court, these were "general" queries not specific to Tsarnaev. E.g., 4.A.1641–44. Question 90 asked for the venirepersons' "feelings about the death penalty in a case involving someone who is proven guilty of murder," again, with no reference to the facts of Tsarnaev's case. Add.529. As voir dire made clear, jurors correctly read Questions 88–90 to seek general, not case-specific, views. See OB.204–06 (discussing Jurors 4, 186, and 208, all of whom gave neutral answers to these questions, but thought death the only appropriate punishment for Tsarnaev in particular).[25]

Finally, Questions 95 and 96 focused on the venirepersons' ability to cast a *vote* for death or life, respectively, but only after *assuming* that those were the

[25] The government counters that these three prospective jurors revealed their disqualifying biases later. RB.165. But that was happenstance, and capital voir dire does not tolerate even the risk of bias. See, e.g., Morgan, 504 U.S. at 739; Turner, 476 U.S. at 37 (plurality op.); Aldridge v. United States, 283 U.S. 308, 314 (1931). The government acknowledges that Questions 88–90 did not, by their terms, call for the disclosure of this information. RB.165.

"appropriate punishment[s]." Add.530–31. E.g., 8.A.3295 (Question 95 "asks you first to assume that you found [the death penalty] appropriate and then asks whether you could vote for it."). The questions did not ask whether, or under what circumstances, the jurors could make the prior determination that life was appropriate. So, for example, when Juror 41 said that she was "not sure" whether she "could . . . conscientiously vote for the death penalty" for Tsarnaev (RB.174 (citing 26.A.11736)), she was not taking into account the facts posited by the Court. See 2.A.545 ("[W]hen I'm answering that question, . . . I don't know anything about the case."). In short, nothing in the questionnaire posed the proper query that Tsarnaev sought: Would you automatically vote to impose the death penalty, without considering mitigating evidence such as a defendant's youth and family relationships, if you found him guilty of deliberately killing a child by means of a weapon of mass destruction?

In large part, the same was true of oral voir dire, which recapitulated the questionnaire. Seven seated jurors (Jurors 35, 41, 102, 229, 349, 480, and 487) answered general queries about their ability to vote for a life sentence, queries that did not invite them to have "in their minds" the particulars of Tsarnaev's case, as the District Court imagined they would. OB.190–91; see Add.120–21. In at least two instances, the Court told prospective jurors not to take specifics into account.

For example, the government cites Juror 102's statement: "I have no . . . views either way. I am really in the middle. I would have to hear everything and make an educated decision." RB.175 (quoting 2.A.940). Here is the line of questioning that elicited that response: "[O]f course *you don't know what the evidence is you're going to hear* . . . but can you envision evidence that would lead you to feel that the death penalty was the right decision . . . and vote for it? . . . And can you envision that there was evidence that you could consider that might lead you to conclude that the death penalty was inappropriate and that life imprisonment was the appropriate sentence?" 2.A.940 (emphasis added). Nothing in that exchange forecloses the possibility that Juror 102 was impaired in this case; that is, that she could envision evidence warranting a life sentence in an ordinary capital case, but not one involving the deliberate killing of a child with a bomb. As explained in Tsarnaev's Opening Brief, and not disputed by the government, the same was true of Juror 480. OB.214–15. For these two seated jurors, the government has not pointed to a single question that permitted—let alone invited—consideration of the facts of Tsarnaev's case when affirming the ability to consider mitigating evidence and vote to impose a life sentence.

2. The government overstates the out-of-Circuit support for its position.

Courts have split on the extent of Morgan's reach. Compare OB.206 with RB.160, 162 n.37. But the split is not as lopsided as the government contends.

Two of the three federal circuits (the Fourth and Sixth) addressed the issue in AEDPA-governed habeas corpus cases, and held only that the underlying state-court decisions had neither contravened nor unreasonably applied Morgan. Richmond v. Polk, 375 F.3d 309, 330 (4th Cir. 2004); Hodges v. Colson, 727 F.3d 517, 527 (6th Cir. 2013). Indeed, the trial court in Hodges had allowed a case-specific question: whether venirepersons "could impose a life sentence on a defendant who had a prior conviction for a violent felony." Id. The Tenth Circuit's decision in McVeigh, 153 F.3d 1166, is unpersuasive. Johnson concisely describes the error: McVeigh "turn[s] the minimum inquiry that Morgan requires into the maximum inquiry that Morgan permits." 366 F. Supp. 2d at 833.

The government also misses the point of the federal district court cases, arguing that "they do not hold that Morgan requires case-specific questions." RB.160. Tsarnaev does not contend that Morgan invariably demands case-specific voir dire, or that voir dire must encompass a case's every unfavorable fact. Morgan does establish, however, that in a prosecution alleging offense elements and aggravating circumstances so inflammatory that they threaten to overwhelm a juror's capacity to entertain mitigating evidence, a defendant is entitled to voir dire sufficient to guard against that risk. Each of the district court cases accords with that view of Morgan. Johnson, 366 F. Supp. 2d at 850 (in FDPA case involving murder of children, holding that "in this case, 'case specific' questions are

appropriate—indeed, necessary— . . . to allow the parties to determine the ability of jurors to be fair and impartial *in the case actually before them*"); Fell, 372 F. Supp. 2d at 769 ("[T]he Supreme Court's reasoning in Morgan *supports* the use of case-specific questions in some circumstances."); United States v. Burgos Montes, 2012 WL 1190191, at *2 (D.P.R. Apr. 7, 2012) (agreeing with Fell).

Finally, the government asserts that the state cases cited by Tsarnaev "relied more on state-court precedents than on Morgan." RB.162. In fact, the California, Louisiana, Missouri, and Ohio high courts all resolved this question after extensive discussion of federal constitutional law, including Witherspoon and Morgan. None of these courts said that its decision rested on state law alone, and several said the opposite. Cash, 50 P.3d at 342–43; State v. Turner, 263 So. 3d 337, 365 (La. 2018); State v. Jackson, 836 N.E.2d 1173, 1192 (Ohio 2005).[26]

B. The District Court's refusal to question the venirepersons about the contents of the media coverage that they had seen violated *Patriarca*.

Patriarca states a clear rule, unaffected by Mu'min v. Virginia, 500 U.S. 415 (1991): in high-profile cases, district judges must ask venirepersons about the contents of the publicity that they have seen, so that the judge, not the juror, can

[26] The government's extended effort to demonstrate that Tsarnaev proposed some improper questions, RB.166–71, is immaterial in light of the concession that Tsarnaev suggested at least one "arguably proper" variant. RB.169 n.40. To the extent that the District Court refused to pose this variant on the grounds that it sought to stake out the jurors' views, the Court abused its discretion.

gauge the latter's impartiality. 402 F.2d at 318. Publicity concerning this case, the vast majority of it unfavorable to Tsarnaev, saturated Boston in the 20 months between the bombings and the start of Tsarnaev's jury selection. See ante § I.A.2.b. There was a more than "significant possibility that jurors [had] been exposed to potentially prejudicial material," triggering Patriarca's duty to inquire. 402 F.2d at 318. Because the District Court largely failed to do so here, the jurors' assurances of impartiality carry little weight.

1. *Patriarca* requires content questioning.

Patriarca obliged the District Court to question the venirepersons about the contents of the media coverage they had heard about this case, a duty not discharged merely by asking, as the Court did, whether the venirepersons could put aside whatever they had heard and decide impartially. See OB.217–26.

In response, the government first contends that "this part of Patriarca was dicta," adding that the case "did not 'announce[]' any sort of binding 'supervisory rule.'" RB.178, 182 (quoting OB.223). Granted, the appellate claim in Patriarca concerned the denial of motions for a continuance and a change of venue in light of prejudicial pretrial publicity. 402 F.2d at 315. But after rejecting that claim, Patriarca "fe[lt] bound" to go further and address the adequacy of the voir dire, declaring that in high-profile cases, district judges "should proceed to examine each prospective juror . . . with a view to eliciting the kind and degree of his

exposure to the case." Id. at 318. Patriarca would not have spelled out this detailed procedure except to announce binding guidance for district courts. Indeed, this Court has since clarified that this passage from Patriarca states "the standards of this circuit." Medina, 761 F.2d at 20. Trial judges in this Circuit adhere to Patriarca. E.g., Casellas-Toro, 807 F.3d at 384 (noting that District Court "asked [each] potential juror to tell it what he or she knew about Casellas" and "the sources of the information").

Next, the government says that the voir dire here did elicit the "kind and degree" of the venirepersons' exposure to the case by asking "what newspapers, radio programs, and television programs each prospective juror viewed and with what frequency, as well as how much media coverage he or she had seen about the case." RB.179 (citing Add.551–52). That suffices, the government says, because "'[t]his Court's subsequent decisions'" have not "'read Patriarca to compel content questioning.'" RB.179 (quoting OB.219). Learning that a prospective juror reads the *Boston Globe* every day and has seen a lot of coverage about the case is not the same as learning that she has read *Globe* articles relating the opinions of Patricia Campbell, Mark Fucarile, and Liz Norden that Tsarnaev should die. See ante § I.A.2.b (citing 26.A.10977a–78; 26.A.11048–50). More important, the government misreads Patriarca, which does call for inquiry into what prospective jurors have seen. Patriarca endorsed ABA standards calling for content

questioning. 402 F.2d at 318 & n.3 (citing Am. Bar Ass'n, Standards Relating to Fair Trial and Free Press § 3.4(a), at 130–37 (Tentative Draft Dec. 1966)). Under those standards, "questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case." Am. Bar Ass'n, ante, § 3.4(a), at 130, available at 25.A.11628.

Most important, this Court's decision in Vest, 842 F.2d 1319, clarified that the deficiency Patriarca aimed to cure was delegating to prospective jurors the evaluation of their own impartiality—a defect that only content questioning can address. In Vest, consistent with Patriarca's directive, "[j]urors . . . were each asked to recount all that he or she knew about the case." 842 F.2d at 1332. By contrast, during the voir dire criticized in Patriarca, "the district court inquired of the jurors collectively whether they had been *prejudiced* by adverse publicity." Id. The "flaw in this procedure," Vest explained, "was that '[t]he court's questioning in no way elicited what, if anything, the jurors had learned, but let the jurors decide for themselves the ultimate question whether what they learned prejudiced them.'" Id. (quoting Rhodes, 556 F.2d at 601). Under the correct approach, as specified in Patriarca and related decisions, "jurors were not asked to decide for themselves the 'ultimate question' of impartiality." Vest, 842 F.2d at 1332. Rather, "once a juror admitted to any knowledge of the case, he or she was individually questioned as to the facts and extent of such knowledge." Id. Contrary to the government's

characterization, Vest concerned not just individual versus group voir dire (RB.180), but also content versus non-content questioning.

2. *Mu'min* does not foreclose Tsarnaev's claim.

As Tsarnaev anticipated (OB.222–23), the government places heavy emphasis on Mu'min. RB.180–82. The government first resists Tsarnaev's effort to show that he falls within Mu'min's exception for cases, such as Irvin, 366 U.S. 717, involving a "'wave of public passion engendered by pretrial publicity.'" 500 U.S. at 429. See RB.182. The government asserts "important differences between this case and Irvin," including "the population of the venue" and "the fact that several seated jurors in Irvin expressed serious bias." RB.181. True, Boston is larger than Gibson County, Indiana, but in all other relevant respects, this case matches or exceeds Irvin. Six of the seated jurors believed, based on pretrial publicity, that Tsarnaev was guilty, in comparison to the eight who thought so in Irvin. Compare OB.83–84 with Irvin, 366 U.S. at 727. Media coverage here included all of the "damaging information" that Mu'min highlighted in its description of Irvin: "details of the defendant's confession" to multiple crimes, "his unaccepted offer to plead guilty in order to avoid the death sentence," and "numerous opinions as to his guilt, as well as opinions about the appropriate punishment." 500 U.S. at 429. Moreover, pervasive digital and social media allowed news and opinion about Tsarnaev's case to penetrate all aspects of daily

life in Boston in a manner unimaginable at the time of Irvin's trial. See ante §§ I.A.2.b and I.A.2.d. And Gibson County did not shelter in place while law enforcement officers scoured six counties for Irvin. Nor did the District Court conduct the "more extensive examination" that Mu'min contemplates merely by questioning the venirepersons individually. See RB.181–82. Tsarnaev's voir dire mirrored Mu'min's in the relevant respect: the lack of content questions.

The government also disagrees that Patriarca survives Mu'min because the former announced a supervisory, rather than a constitutional, rule. RB.182. But the distinction is critical. Mu'min decided a constitutional question, and accepted that federal appellate courts "enjoy more latitude in setting standards for *voir dire* in federal courts under our supervisory power." 500 U.S. at 424. See also Kater v. Maloney, 459 F.3d 56, 66 n.99 (1st Cir. 2006) (Mu'min "carefully distinguished between constitutional requirements which states must meet and the exercise of . . . broader supervisory authority over cases tried in federal courts").

Patriarca did not mention the Constitution, and so must have derived from this Court's supervisory authority, a power that this Court has exercised to mandate other voir dire questions—as in Patriarca—without expressly saying that it was doing so. E.g., United States v. Pappas, 639 F.2d 1, 4–5 (1st Cir. 1980) (holding that district court erred in failing to ask venirepersons "if they would give added credence to testimony by government employees"); see United States v. Anagnos,

853 F.2d 1, 3–4 (1st Cir. 1988) (explaining that Pappas rule is supervisory rather than constitutional). Mu'min itself recognized that the other federal courts of appeals to have mandated content questioning "have not expressly placed their decision on constitutional grounds." 500 U.S. at 426–27 (citing, among others, United States v. Davis, 583 F.2d 190 (5th Cir. 1978)). Thus, notwithstanding Mu'min, the Fifth Circuit has reaffirmed Davis on supervisory grounds. United States v. Beckner, 69 F.3d 1290, 1292 n.1 (5th Cir. 1995) ("Mu'Min does not abrogate our holding in Davis that, where pretrial publicity creates a significant possibility of prejudice, the district court must make an independent determination of the impartiality of jurors.").

3. The voir dire was inadequate.

The government accepts that the District Court qualified nine seated jurors "without learning anything about the contents of the media coverage each had seen." OB.194; see RB.183. But, the government says, the voir dire was nonetheless satisfactory because "[n]one of the seated jurors' responses suggested a need to delve into the specifics of the media coverage they had seen." RB.183. In fact, their responses cried out for further investigation. Of the nine who did not discuss content, four believed, based on pretrial publicity, that Tsarnaev had participated in the bombings. See 2.A.879 (PJ 83); 4.A.1675 (PJ 229); 5.A.2009 (PJ 286); 6.A.2632–33 (PJ 395). None were asked what they had believed, from

media coverage, that Tsarnaev had done. Two more reported having seen "a lot" of media coverage about the case. 26.A.11702 (PJ 35); 26.A.11926 (PJ 480). Neither was asked: what coverage? It is immaterial that all "indicated that they . . . could avoid drawing any conclusions at trial based on media coverage." RB.183–84. As this Court has held, the district judge, not the prospective juror, must judge the latter's impartiality. Vest, 842 F.2d at 1332; Rhodes, 556 F.2d at 601; see also United States v. Concepcion Cueto, 515 F.2d 160, 164 (1st Cir. 1975) ("[W]e do not think the jurors' assurances of continued impartiality nullified [the defendant's] claim of prejudice. . . . [A] juror's impressions, however honest, cannot be dispositive where the improper information is as damning and material as this.").

Finally, the government defends some of the District Court's reasons for declining to pose content questions. RB.184. (Not, however, the Court's mistaken belief that such queries would duplicate the questionnaire. See OB.225.) Concern about "unmanageable data" (Add.305) from a single question—in a case where 1,373 venirepersons each completed a 101-question written questionnaire and the Court allotted 21 courtroom days for voir dire—appears misplaced. The fear that questioning "could inadvertently create bias where none existed" is not logical. If prospective jurors recalled media coverage well enough to mention it during voir dire, and the coverage was harmful to Tsarnaev, then potential bias was already present. Far from "reinforc[ing] potentially prejudicial information," content

questioning would have brought such material into the light. The parties and the Court could have determined the publicity's effect, excused prospective jurors where appropriate, and otherwise inoculated the venire with curative instructions. The path that the District Court chose instead—letting bias lie latent, unacknowledged and unaddressed—has little to recommend it, and a consistent line of this Court's precedents arrayed against it.

V.

The Jurors Could Not Have Rendered A Reliable Penalty Phase Verdict Without Considering Evidence Of Tamerlan's Homicidal Past.

The relative culpability of the two brothers, one of whom was dead at the time of the trial, was the central issue at Tsarnaev's sentencing. To try to explain why Jahar, a 19-year-old with no previous history of violence, joined in these crimes, the defense introduced evidence that Tamerlan, his older brother, was aggressive, domineering and had become radicalized first. From that, the defense argued that Tamerlan influenced, persuaded, and drove Jahar to join in the bombings, acts Jahar would never have committed otherwise. The government hotly contested these mitigating factors, arguing to the jurors that Jahar deserved to die because he and Tamerlan "bear the same moral culpability for what they did." 19.A.8798. It is clear from their verdicts—rejecting the death penalty for Jahar for any act Tamerlan was shown to have participated in—that the jurors cared about the relative culpability of the two brothers.

But the jurors' relative culpability assessment was impaired by the District Court's erroneous ruling preventing them from hearing the most relevant evidence bearing on Tamerlan's radicalism, proclivity for violence, and influence over his brother. Specifically, the jurors never heard that, on September 11, 2011, Tamerlan was the [redacted] in the robbery and brutal killing

of three men, committed in the name of jihad—facts that he made known to his younger, impressionable brother prior to their commission of the bombings.

In urging this Court to affirm the District Court's exclusion of this evidence, the government makes two claims: first, that Tamerlan's prior murder of three drug-dealing infidels was irrelevant to sentencing; and, second, that the evidence would have confused the jurors because it would have had to be presented through the statements of Ibragim Todashev, whose credibility the government questions, as well as through various corroborating pieces of evidence. RB.195–213. Both arguments fail factually and legally. Excluding this relevant mitigation violated the Eighth Amendment and the Federal Death Penalty Act.[27]

A. The Waltham evidence was relevant because it bore directly on the mitigating factors the jurors had to find and weigh in determining Jahar's penalty.

As explained in the Opening Brief, the Eighth Amendment and the FDPA set a "low threshold" for the definition and admission of potentially mitigating evidence. OB.242–45; Tennard v. Dretke, 542 U.S. 274 (2004); 18 U.S.C.

[27] The myriad legal issues ancillary to the exclusion of the Waltham facts have been briefed in detail: Did the District Court err in relying on information provided to it *ex parte* by the government? Did the District Court err in declining to review the recordings of Todashev? Did the District Court err in denying disclosure of Todashev's statements to the defense? Was there any viable basis for the invocation of the law enforcement privilege? See OB.274–85; First.Suppl.OB.; Third.Suppl.OB. This Reply focuses on the core Eighth-Amendment violation of the erroneous exclusion of relevant mitigation evidence.

§ 3593(c) (evidence is admissible at penalty phase "regardless of its admissibility under the rules governing admission of evidence at criminal trials"). Further, constitutionally and statutorily, the relative culpability of the participants in a crime is important mitigation for a sentencing jury to consider. OB.247–49. The government does not disagree with these basic principles. RB.194–95 (discussing Tennard, 542 U.S. 274; Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); and § 3593(c)); id. at 204–09 (discussing relative culpability). But it argues that the Waltham murders do not meet that low threshold because that evidence would have told the jurors nothing about the brothers' relative culpability for the bombings. The government is wrong. The mitigation theory was never that Jahar acted under the duress of Tamerlan, but rather that he was less culpable, and therefore deserved to live, because he would not have committed these crimes but for Tamerlan. Tamerlan's prior aggressive and domineering acts, and the fact that he had become radicalized first, were relevant to proving Jahar's lesser culpability in the bombings.

Over the government's objection, the District Court admitted other, lesser evidence of Tamerlan's aggressiveness, such as his verbal eruptions at others for not adhering to his radical religious doctrine (see 17.A.7510–13, 7521–25, 7529–32), as well as evidence of the influence he wielded over his younger brother, girlfriend, and others (see 17.A.7777–83; 18.A.8140–44), finding that it was

relevant to Tamerlan's "domination."[28] 22.A.10015. Even that limited evidence convinced three jurors to find all five mitigating factors regarding Tamerlan's prior radicalization, leadership role in the bombings, and influence over Jahar. Add.90–92. But that evidence conveyed only a faint outline of Tamerlan's culpability.

The brutal triple homicide in the name of jihad clearly would have vivified Tamerlan's aggression and radicalization. The Waltham murders would have demonstrated the nature of Tamerlan's influence and leadership over Jahar and, thus, their relative roles in the bombings. As the District Court told the government *ex parte*, [redacted] Suppl.SAdd.7. After all, if screaming at a halal butcher for selling turkeys for Thanksgiving shows Tamerlan's dominance and radicalization, as the District Court found, his [redacted] for jihad would have demonstrated that same point far more strongly and persuasively.

The government is incorrect that the jurors would have had to take a speculative leap in connecting the Waltham murders to Tamerlan's influence over Jahar. RB.199–201. On the contrary, had this evidence been admitted, the jurors would have learned that, according to his college friend Dias Kadyrbayev, Jahar

[28] The government acknowledges this other "bad act" evidence was admitted to show Tamerlan's domination and radicalization and does not contest on appeal the propriety of its admission, but offers no basis for distinguishing the relevance of this evidence from the relevance of the Waltham evidence. RB.200–01.

knew by the fall of 2012 that Tamerlan had committed those brutal acts. See 24.A.11294–95. And the jurors would have known that it was only after the September 11, 2011 Waltham murders—and Tamerlan telling Jahar about these killings he had committed for jihad—that Jahar, under his brother's influence and guidance, radicalized in belief and action. This would have helped explain the evidence the jurors did hear: that in late 2012 and early 2013, at the apex of Tamerlan's own radicalization and proselytizing,[29] Jahar demonstrated signs of radicalization for the first time. It was then that Kadyrbayev noticed a change in his close friend's demeanor and behaviors: Jahar stopped drinking and smoking, began praying more, started regularly watching Islamic videos on YouTube, and stopped socializing often with his college friends. 24.A.11294–95. During this time, after spending holiday break from college with Tamerlan in Cambridge (see 11.A.4713–15; 14.A.6343–44), Jahar not only began texting about jihad (1.Supp.App.72–76; 14.A.6343–44), but turned towards violence, borrowing a gun from Stephen Silva (12.A.5259, 5263–67), and accompanying Tamerlan to a shooting range. 14.A.6060–68. Had the jurors heard [redacted] (DE.266 at 10–11;

[29] See 17.A.7788–7805 (FBI 302s of Interviews of Magomed Dolakov); 17.A.7806–09 (FBI 302 of Interview of Viskhan Vakhabov); 17.A.7859–72 (FBI 302 of Interview of Magomed Kartashov).

Second.Suppl.SAdd.35–36), at least one juror might have also found that Jahar was drawn into the bombings in the same way during late 2012 and early 2013.

Fair evaluation by the jurors of the broader relationship between the brothers requires consideration of the Waltham murders. Waltham makes clear, in a way no other evidence available to the defense could, that Tamerlan was predisposed to violence, especially religiously-motivated brutality, well before the bombings; and that when he influenced his impressionable younger brother toward radicalism, it was not merely toward radical beliefs, but radical violence. This evidence showed, in other words, that Tamerlan walked the path first and brought his younger brother along behind him. Had they been admitted, the Waltham murders would have permitted the defense to rebut more forcefully that this was not a "partnership of equals," as the government urged (19.A.8798), but a leader and a follower—as three jurors found—with Tamerlan, as the driving force, the more culpable of the two, in the crimes he ultimately brought Jahar to commit with him.

And had this evidence been admitted, the defense would have been better able to respond to the government's argument that it did not matter how Jahar became radicalized ("So what? Even if it's true, so what? Does it matter whether you get your jihadi files from your brother, a distant cousin, a quick search of the Internet or Anwar al-Awlaki himself?" 19.A.8795). Of course it mattered. Had this been a case of two men radicalizing separately and coming together to commit

an act of violence, this would have been a "partnership of equals" of little mitigating value. But the evidence showed that Tamerlan radicalized Jahar through his repeated sending of jihadi readings and through his example. The Waltham murders would have made it clear that Tamerlan inspired his younger brother to do more than believe in jihad, but to act on those beliefs, just as Tamerlan had on September 11, 2011. The government could have still argued to the jurors, as it does to this Court (RB.201–02, 206), that Jahar was nevertheless a willing criminal on his own, but the impact of Tamerlan's prior violence on Jahar's radicalization—and on his willingness to move from tweeting to bombing—was something that the jurors should have decided for themselves.

The government concedes that when other evidence of domination is present, the violent history of a co-conspirator is relevant to show relative culpability. RB.198. And, the government separately acknowledges the other evidence of Tamerlan's domination. RB.205 n.46 (citing other trial evidence showing Tamerlan was the leader in the brothers' relationship). That Tamerlan was not just Jahar's co-conspirator but also a close member of his nuclear family only strengthens the relevance of this prior history of violence, particularly as to the key question the jurors had to determine (mitigating factor 7) of whether Jahar would have committed the offenses were it not for Tamerlan. See, e.g., Miller v.

Alabama, 567 U.S. 460, 477–78 (2012) (discussing importance in death penalty jurisprudence of familial history of violence on the circumstances of the offense).

The government further argues that the Waltham evidence is not relevant as evidence of Tamerlan's domination or influence because the circumstances are just too different from the bombings. RB.205–06. [redacted] And, in both instances, Tamerlan justified his actions by reference to radical Islam. Tamerlan influenced Jahar to commit murder, [redacted]. Precluding the Waltham murders denied the defense the ability to make a complete case for Jahar's relatively lower culpability. See Troedel v. Wainwright, 667 F. Supp. 1456, 1462 (S.D. Fla. 1986) (excluded evidence of co-defendant's prior violence bore on co-defendant's greater role and motive).

B. Evidence of Tamerlan's violent past would not have confused or misled the jurors.

The government also defends the preclusion of the Waltham murders by insisting that this evidence's admission would have prompted a lengthy, involved trial within a trial. RB.201. This concern is overblown. The defense would have relied primarily on the government's sworn search warrant affidavit, which credited Todashev's statements to the FBI. In addition, the defense likely would have sought to introduce corroboration in the form of evidence from Tamerlan's

computer showing his close relationship to Todashev, his possession of a document justifying crimes against disbelievers for jihad-related purposes, and photographs of Tamerlan possessing various guns. See OB.237–38, 256–58. It would have taken little time to authenticate and introduce this material, all of which the government had provided in discovery.

As an initial matter, the Waltham evidence was sufficiently reliable to go to the jurors, who could decide whether to credit it and how much weight to give it in mitigation.[30] See, e.g., United States v. Guzman-Montanez, 756 F.3d 1, 9 (1st Cir. 2014) ("When the issue lies on credibility of the evidence, it is up to the jury to decide. The factfinder is free to conduct its own interpretation of the evidence."); Nelson v. Quarterman, 472 F.3d 287, 313 (5th Cir. 2007) (en banc) (holding, in vacating a death sentence, that the "strength" or "sufficiency" of mitigating evidence is for the jury to decide). It is unsurprising that the government does not suggest that Tamerlan did not commit the homicides. And the government would have had great difficulty disputing Tamerlan's participation in the homicides. In

[30] Because of the relaxed evidentiary standards, the government does not argue that Todashev's unavailability was a bar to admission in the penalty phase context. Indeed, the District Court permitted the statements of other unavailable witnesses—none of whom were deceased—at the penalty phase, including the video of victim Lingzi Lu's father delivering a eulogy (GX–1600) and the 302 reports of interviews of various friends of Tamerlan's describing Tamerlan's increasing radicalization. 17.A.7788–7805 (FBI 302s of Interviews of Magomed Dolakov); Id. at 7806–09 (FBI 302 of Interview of Viskhan Vakhabov); Id. at 7859–72 (FBI 302 of Interview of Magomed Kartashov).

applying for a warrant to search Tamerlan's car after the bombings, the government adduced Todashev's confession to establish probable cause to believe that the car contained evidence of the Waltham murders.[31] At the government's urging, Magistrate Judge Bowler credited that showing of probable cause and issued the warrant.

[redacted]

31 [redacted]

[redacted] See Franks v. Delaware, 438 U.S. 154, 164–65 (1978) ("[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing . . . [I]t is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."). Nor has the government given any reason, factual or otherwise, why the sworn affidavit it asked Magistrate Judge Bowler to credit should now be disbelieved.

The Waltham evidence would not have been extensive: it would have consisted of Todashev's statements and proof that the murders in fact occurred. As with the other mitigating and aggravating factors, the District Court retained control over how much of this evidence could have come in, and could have limited the evidence as appropriate, including through limiting instructions.[32] If

[32] United States v. Mitchell, 502 F.3d 931, 991–92 (9th Cir. 2007), cited by the government (RB.212), in fact supports the admission of the Waltham evidence. In Mitchell, the District Court admitted evidence of two prior murders committed by

the evidence became extensive or strayed too deep into the weeds, the District Court easily could have cut off the presentation—an appropriate and less draconian remedy than excluding all evidence of Tamerlan's homicidal past.

The government is also wrong that, had it been admitted, evidence of the Waltham murders would have confused the jurors about its significance to Tsarnaev's mitigation case. RB.210–13. The government speculates that if the jurors heard this evidence of Tamerlan's prior acts of brutality, they "could have [been] misled . . . into believing that Tsarnaev did not deserve the death penalty simply because he was not as bad as his brother." RB.211–12. They would not: the jurors had the mitigating factors before them, which made clear that Tamerlan's character and prior conduct were relevant because they bore on the broader circumstances of Jahar's commission of the offense. Thus, the jurors had to resolve whether Jahar acted under the influence of Tamerlan; whether Tamerlan's violence and aggressiveness made Jahar susceptible to following his lead; whether Tamerlan instigated and led the bombings; whether Tamerlan radicalized first and encouraged Jahar to follow him; and whether Jahar would ever

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the prosecution witness, and simply limited how much detail the defense could present. The District Court could have done the same here. United States v. Purkey, 428 F.3d 738, 757 (8th Cir. 2005), also cited by the government (RB.212), has no bearing here: there, the defense sought to offer evidence that the defendant's wife had poisoned him prior to his commission of the crimes, but did not have any evidence of the effects of the substance, so the Circuit found that the District Court properly excluded it.

have committed these crimes were it not for Tamerlan. Add.91–92. Moreover, the government argued to the jurors that the mitigation theory of Tamerlan's influence on Jahar was baseless because there was no evidence to support it. See 19.A.8725, 8785–87, 8794. The Waltham murders were that evidence, and it would not have confused the jurors to learn about them, contrary to the government's claims. RB.210–13.

The jurors were trusted to follow the Court's instructions about the mitigating factors. See Richardson v. Marsh, 481 U.S. 200, 211 (1987). And the jurors' penalty phase verdicts—giving Jahar life on the 11 of 17 death eligible counts where Tamerlan was present—demonstrate that they fully understood that Tamerlan's relative culpability was mitigating only to the extent that it bore on the brothers' respective roles in the commission of the bombings. Add.75–98. The government's suggestion on appeal that the jurors would have lost sight of that distinction had they heard the stronger Waltham evidence is unfounded.

Denying the defense the ability to present the Waltham evidence severely hampered Tsarnaev's case, and denied him his rights under the Eighth Amendment and FDPA to present all mitigating evidence in his favor. See Tennard, 542 U.S. at 287 (finding an error of constitutional magnitude to prevent jurors from hearing evidence that "might serve 'as a basis for a sentence less than death.'") (citations omitted); Gregg, 428 U.S. at 203–04 ("So long as the evidence introduced and the

arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision."); Buttrum v. Black, 721 F. Supp. 1268 (N.D. Ga. 1989), 1314–16, aff'd, 908 F.2d 695 (11th Cir. 1990) (reversible error under the Eighth Amendment to have excluded social worker's hearsay testimony that defendant's co-conspirator told her several years earlier that he had fantasized about rape, had attacked his mother, and had homicidal feelings toward her).

C. The government has not shown beyond a reasonable doubt that no juror would have rendered a different penalty verdict if the Waltham evidence had been admitted.

The government's argument against prejudice is fundamentally the same as its argument in support of exclusion: just as the Waltham evidence is purportedly irrelevant because it does not tend to show that Jahar participated in the bombings under duress or that he had not become radicalized, for the same reasons, its exclusion could not have affected the jurors' decision. RB.217–19. But, as detailed above, this evidence was relevant and necessary to present an accurate picture of the brothers' relative culpability. There were two participants in the Marathon bombings. One, Tamerlan, was dead. A juror could reasonably conclude that the remaining participant, Jahar, if equally culpable, should suffer the same fate. But if the remaining participant were shown to be less culpable, a

juror might well have shown mercy to him. The exclusion of the Waltham evidence undermined the defense's case in mitigation and enhanced the government's case in aggravation. Whether analyzed under the correct structural-error standard (OB.266–67) or under the harmless-error standard propounded by the government (RB.214–17), the result is the same: Tsarnaev was prejudiced. Without the full picture of who Tamerlan was, and what he had done in the past, Jahar was denied a fair penalty verdict.

When significant, relevant mitigation is excluded from the sentencer's consideration, reversal is required. In no capital case has the Supreme Court ever held that the exclusion of relevant mitigation evidence was not prejudicial. Indeed, beginning more than 30 years ago, with Lockett, 438 U.S. 586, and Eddings, 455 U.S. 104, the Court has routinely vacated death sentences whenever it has held that the sentencer was precluded from considering relevant mitigating evidence.[33]

The government cannot show beyond a reasonable doubt that if the defense had been permitted to present evidence of Tamerlan's participation in the Waltham armed robbery and triple homicide, no juror would have voted for life instead of death. The exclusion of the Waltham murders allowed the government to discredit

[33] See also McKinney v. Arizona, S. Ct. No. 18–1109 (presenting question whether correction of error under Eddings, 455 U.S. at 112, requires resentencing in trial court).

the other evidence Tsarnaev was able to muster in support of his crucial lesser-culpability mitigators. Without Waltham, the government was able to depict Tamerlan as bossy and temperamental (RB.220–21), no different than many other older siblings. 19.A.8787. The District Court's ruling allowed the government to characterize the Tsarnaevs as a typical dysfunctional family, not one where the primary male role model was a murderous religious fanatic. 16.A.7084 ("You may hear about family dynamics, family history, family dysfunction. But many people . . . face troubles throughout their lives. Who among them murders a child with a bomb?"). And this ruling allowed the government to criticize the defense for not calling any of Tamerlan's friends—"the people who spent time with him every day"—as witnesses to support the claim that Tamerlan influenced Jahar to commit crimes. 19.A.8793. Of course, had the Waltham murders been admitted, [redacted] See Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1986) (discussing the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain") (citations omitted).

The exclusion of this evidence also increased the weight of aggravating evidence, yielding an unreliable verdict. Porter v. McCollum, 558 U.S. 30, 41–42 (2009). At trial, the jurors heard evidence that Jahar was inspired by jihad and

voluntarily caused horrific suffering. RB.218–19. But the aggravating effect of those facts would have been muted had the jurors known that the older brother who radicalized and led Jahar to participate in the bombings had himself already committed murder in the name of jihad. Of course, perhaps the Waltham murders "could have cut both ways" and been aggravating for some jurors. RB.219. That begs the question: if it would have been aggravating, why did the government seek to exclude it? RB.217. Deprived of this important mitigating evidence, Jahar's jurors never reached the "reasoned moral response" required by the Eighth Amendment regarding his "mitigating evidence—particularly that evidence which tends to diminish his culpability." Brewer v. Quarterman, 550 U.S. 286, 289 (2007); see also Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007).

The government argues that "there is no reason to believe the Waltham evidence would have changed the jury's decision to impose the death penalty." RB.219. *Any* additional evidence showing Jahar's lesser culpability might have tipped the scale to life for at least one juror, let alone this powerful evidence of Tamerlan's extreme violence in pursuit of jihad prior to the bombings. Indeed, the jurors likely would have given the Waltham murders significant weight in deciding Jahar's sentence. Even without knowing that Tamerlan had directed the robbery and killing of three men for jihad, three jurors found that:

- Dzhokhar Tsarnaev acted under the influence of his older brother.

- [B]ecause of Tamerlan's age, size, aggressiveness, domineering personality, privileged status in the family, traditional authority as the oldest brother, or other reasons, Dzhokhar Tsarnaev was particularly susceptible to his older brother's influence.

- Dzhokhar Tsarnaev's brother Tamerlan planned, led and directed the Marathon bombing.

- Dzhokhar Tsarnaev would not have committed the crimes but for his older brother Tamerlan.

And five jurors found that:

- Tamerlan Tsarnaev became radicalized first, and then encouraged his younger brother to follow him.

Add.90–92. And even without evidence of the Waltham murders, the jurors returned life verdicts for each of the 11 counts of conviction for which Tamerlan was present—even for the shooting of Officer Sean Collier, which the government argued Jahar might have personally perpetrated (e.g., 19.A.8726, 8798), as well as for the two conspiracy counts concerning the brothers' agreement to commit the bombings. Add.95–96.

These split verdicts show that the brothers' relative culpability mattered. The jurors gave death on those counts pertaining to Jahar placing the bomb on Boylston Street while his brother was at the finish line, the height of Jahar's responsibility. Add.95–96. They gave life on those counts where Tamerlan placed the bomb, the nadir of Jahar's responsibility. Id. And, significantly, the jurors gave life on the conspiracy counts that, by definition, focused on joint

responsibility, as well as on the counts relating to Officer Collier, for which both brothers were present.[34] Id. The government cannot show beyond a reasonable doubt that the Waltham evidence would not have tipped the scales on the remaining counts, by making clear that, even as to the counts relating to Jahar placing the bomb, Tamerlan was more culpable—just as in the conspiracy counts—as the driving influence.

The prosecution cannot now show to a "near certitude", see Victor v. Nebraska, 511 U.S. 1, 15 (1994), that the excluded evidence of Tamerlan's cold-blooded murders at Waltham, justified in the name of jihad, would not have persuaded even one juror that, contrary to the government's argument, Jahar did not "bear the same moral culpability [as Tamerlan]." 19.A.8798.

The death sentences must be vacated.

[34] The difference between the life verdicts on the two conspiracy counts and the death verdicts on the counts pertaining to the bomb Jahar placed on Boylston Street is fairly attributable to the importance the jurors assigned to the roles of the two brothers. The jurors' findings on the aggravating factors, the mitigating factors, and even the mens rea gateway factors, are exactly the same for the conspiracy counts as for those counts where the jurors returned death verdicts. Add.79–96.

VII.

The Admission Of Victim Impact Testimony From 11 Surviving Spectators Violated The Federal Death Penalty Act.

In his Opening Brief, Tsarnaev contended that although testimony from survivors about their own injuries was proper, the additional testimony elicited by the government about the impact of the crime on these survivors—including their thoughts and fears after the bombings and the enormous difficulties they now faced because of their injuries—constituted improper survivor victim impact testimony. OB.310–43. The government disagrees. RB.254–92.

A. This issue was preserved.

As a threshold matter, the government argues that Tsarnaev failed to preserve this issue and therefore it should be reviewed for plain error only. RB.267–68. The government's argument for waiver is hard to fathom. Before trial, defense counsel objected in writing to any victim impact testimony from survivors of the bombings. 25.A.11495–98. The government responded that it did not intend to offer such evidence. 25.A.11568–69. During trial, when it became apparent the government was offering exactly this type of evidence, the defense repeatedly renewed its objection in open court and in filings. 10.A.4116–18; 25.A.11568–71; 16.A.7120–22; 16.A.7239–40. The District Court overruled these objections (10.A.4119), first finding the testimony "relevant to statutory factors as

well as grave risk" (16.A.7124), and, subsequently, that survivor victim impact testimony was proper. 16.A.7244.

The government now argues that these objections were "not sufficient to preserve the challenges to particular testimony that he raises now." RB.267. It is not clear what specific claims the government is asserting have been waived; after all, defense counsel *did* object to the survivor victim impact testimony from Rebekah Gregory, Sydney Corcoran, Karen McWatters, Celeste Corcoran and Eric Whalley. And not only were those objections overruled, the District Court made clear its view that survivor victim impact testimony was entirely admissible. Thus, defense counsel brought "the alleged federal error to the attention of the trial court [to] enable it to take appropriate corrective action . . . ." Douglas v. Alabama, 380 U.S. 415, 422 (1965).

B. Congress did not intend to permit victim impact testimony from survivors; the challenged testimony here was just that.

On the merits, the government argues, in the alternative, that either Congress intended to permit survivor victim impact testimony, or the testimony at issue here was not victim impact testimony. RB.269–90. Both arguments fail.

18 U.S.C. § 3593(a) provides that when the government seeks a death sentence, it must "serve on the defendant, a notice . . . setting forth the aggravating factor or factors" it believes justify a sentence of death. The aggravating factors on which the government can rely "may include oral testimony, a victim impact

statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information." Id.

In his Opening Brief, Appellant contended that Congress did not intend the phrase "the victim and the victim's family" as used in § 3593(a) to refer to surviving victims. OB.310–17. The phrase "the victim" was used four times in § 3591(a) and twice more in § 3592—and each time it was clear it referred to a victim who had died. OB.312–14. The "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." Gustafson v. Alloyd Co., 513 U.S. 561, 570 (1995).

The government disagrees for two reasons. First, the government argues that victim impact evidence from survivors is admissible under the broad "any other relevant information" clause of § 3593(a). RB.281–83. But this position ignores the "well established canon of statutory interpretation" that "the specific governs the general." RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (citations omitted). The canon "has full application . . . to statutes such as the one here, in which a general authorization and a more limited, specific authorization exist side-by-side." Id. In such statutes, "[t]he terms of the specific authorization must be complied with." Id.

Here, § 3593(a) describes, in specific terms, what aggravating factors relating to victim impact may be alleged: "factors concerning the effect of the offense on the victim and the victim's family." As discussed in Appellant's Opening Brief, this provision refers to homicide victims. OB. 312–14. Under a straightforward application of the specific/general canon, § 3593(a) permits the use of homicide victim impact as an aggravator, but no other kind of victim impact evidence. That is especially true here where Congress used language in § 3593(c) making clear that when it intended to reference surviving victims, it did so explicitly. The absence of any reference to surviving victims in § 3593(a) during Congress's treatment of victim impact evidence was no accident.

This conclusion aligns with the purpose of the specific/general canon, namely, to "avoid[] . . . the superfluity of a specific provision that is swallowed by the general one." RadLAX, 566 U.S. at 645. If, as the government contends, § 3593(a)'s broad reference to all relevant information also applied to victim impact evidence, then Congress' specific reference to "the effect of the offense on the victim and the victim's family" would have been entirely unnecessary—such evidence would have been covered by the reference to "any other relevant information." That result would offend "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204, 208 (1932). To avoid rendering superfluous § 3593(a)'s

express language discussing victim impact, the specific/general canon dictates that the provision's "'[g]eneral language," even if "broad enough to include" surviving-victim impact, "will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" [38] Bloate v. United States, 559 U.S. 196, 207–08 (2010) (quoting D. Ginsberg & Sons, Inc., 285 U.S. at 208). If there were any doubt, the rule of lenity would require this Court to resolve any ambiguity about § 3593(a)'s scope in Tsarnaev's favor. See, e.g., United States v. Pitera, 795 F. Supp. 571, 574 (E.D.N.Y. 1992) (applying the rule of lenity to aggravating factors in pre-FDPA federal death penalty statute, 21 U.S.C. § 848(n)(2)).

Alternatively, the government argues, survivor victim impact evidence was properly admitted under the victim impact evidence portion of § 3593(a), because the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning does not apply here. RB.284–85. The government's postulated proof is that in § 3593(c) Congress used the term "victim" in reference to a surviving victim. RB.285. True. But the government has it backwards: Congress's decision to specify in § 3593(c) that

[38] The government suggests this interpretation would impose some kind of far-reaching limit on "the kinds of information that may be introduced at a capital sentencing. . . ." RB.282. Not so. The "any other relevant information" clause continues to have full scope and effect as to proper aggravating factors. But the government may not use this clause as a Trojan Horse to insert into the statute a reference to survivor victim impact evidence which Congress elected not to include.

"victim" includes surviving victims shows that the unadorned term "victim" in § 3593(a) does not.

In § 3593(c), Congress referred to victims "as defined in section 3510." Section 3510, in turn, cross-references 34 U.S.C. § 20141(e)(2), which defines "victim" as "a person that has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime." This definition plainly includes survivors. If Congress already intended the unadorned term "victim" itself to have the more expansive meaning contained in §§ 3510 and 20141(e)(2), it would have been unnecessary for Congress to draw on § 3510's definition in § 3593(c). The government's interpretation of the term "victim" would render Congress's explicit reference to § 3510 entirely unnecessary, once again offending "the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." D. Ginsberg & Sons, Inc., 285 U.S. at 208.

In addition, the government's position "runs afoul of the usual rule that 'when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.'" Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46:06, p.194 (6th rev. ed. 2000)). In § 3593(a), Congress used the term "victim." But in § 3593(c), Congress used the term "victim, as defined in section 3510." Under ordinary principles of statutory

construction, this Court presumes that Congress meant different things by these different formulations. But the government treats them as identical.

Finally, even if the FDPA authorized victim impact testimony from survivors, under the plain terms of § 3593(a), the government could rely on such evidence only with proper notice to the defense. The government concedes that in this case "the victim-impact aggravating factor the government alleged [in its § 3593 notice] was expressly limited to the four victims who were killed." RB.278. In a pretrial motion, defense counsel objected to the surviving victim impact evidence upon this precise ground. 25.A.11495. Accordingly, as argued in the Opening Brief, if the government did *not* limit the testimony of the surviving witnesses to non-victim impact evidence, then the plain terms of the FDPA were violated by the lack of notice. OB.316–17.[39]

The government argues in the alternative that no survivor victim impact evidence was presented. RB.269–78. Instead, it asserts the evidence from the 11 witnesses at issue was directly relevant to prove the aggravating factors that defendant "created a grave risk of death to one or more persons," the crime was committed "after substantial planning and premeditation," the crime was "an act of

[39] Without citation to the record, the government argues in a footnote that any notice issues have been waived. RB.279 n.64. As discussed above, however, the notice component of this claim was preserved.

terrorism," and the crime involved assault with the intent to maim. RB.270, 272–74.

Appellant discussed the evidence from these witnesses at some length in his Opening Brief and will not reprise it here. OB.318–34. None of this testimony is relevant to the factors the government now identifies. While it may have been proper for all 11 of these witnesses to testify about the bombings and their injuries, further testimony about their emotions, thoughts and feelings after the bombings and the difficulties they now face in life was simply not relevant to the aggravating factors the government has identified. Admission of that evidence was error.

C. The government cannot prove admission of this emotionally charged evidence was harmless.

The government argues that even if survivor victim impact evidence was improperly introduced, any error was harmless beyond a reasonable doubt. RB.290–92. There are two thrusts to the government's argument: first, jurors were told the only victim impact evidence they could consider related to the four victims who had died; and, second, the remaining guilt and penalty phase evidence "supported imposition of the death penalty in this case." Id.

At the time the various victim impact witnesses testified, no limiting instruction was given. The instruction on which the government now relies was given at the end of the penalty phase, weeks after the testimony had been received. 19.A.8682. The government cites the presumption that jurors follow instructions.

RB.291. But, as explained in the Opening Brief, this presumption is rebuttable. OB.336–37. The key factor in assessing whether a limiting instruction will be effective is the nature of the evidence itself: is the evidence of a type jurors can reasonably be expected to forget in reaching their decision? Richardson, 481 U.S. at 208. If so, then it is proper to apply the presumption. But if not, then, not.

The government ignores this aspect of the presumption. As detailed in the Opening Brief, however, the quantity and nature of the survivor victim impact evidence that jurors heard render it extremely unlikely that reasonable jurors could simply ignore this testimony in deciding whether Tsarnaev should live or die. OB.337–38. This is especially true here, where the prosecutor repeatedly relied on this evidence in his penalty phase closing (19.A.8702, 8704, 8713, 8714), the limiting instruction came weeks after the testimony was introduced, and if jurors actually followed the instruction, they would have had to consider the testimony of 11 prosecution witnesses as to their injuries while ignoring the most dramatic and emotional parts of testimony from these very same witnesses. Compare Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (Hand, J.) (noting that an instruction telling jurors to consider evidence as to one defendant but ignore it as to others constitutes "the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody's else").

The government argues that the remaining evidence "supported imposition of the death penalty." RB.292. This misstates the harmless error standard. When aggravating evidence is improperly admitted at a capital penalty phase, the harmless error question is "not whether the legally admitted evidence was sufficient to support the death sentence . . . but rather, whether the [government] has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" Satterwhite v. Texas, 486 U.S. 249, 258–59 (1988) (quoting Chapman, 386 U.S. at 24). Given the inherent power of victim impact evidence, the number of such witnesses presented and the prosecutor's reliance on this evidence in urging jurors to impose death, the government cannot prove beyond a reasonable doubt that this compelling evidence did not contribute to the death verdicts. OB.339–43. The government seeks to minimize the power of the victim impact evidence, arguing that because jurors already knew that the surviving victims would suffer long-term consequences, live victim impact testimony from 11 surviving victims would not have mattered to the jurors. RB.291. If not, why did the government elicit it? Of course, the same could be said for any victim impact testimony—all jurors are keenly aware that family members of victims who have been killed will suffer terribly from the loss of a loved one.

Furthermore, in advancing its harmless error argument, the government focuses exclusively on the aggravating evidence presented. RB.290–92. But the Supreme Court has long made clear that proper harmless error review requires that "the whole record be reviewed in assessing the significance of the errors." Yates v. Evatt, 500 U.S. 391, 409 (1991). And here, while there certainly was significant aggravation, the fact of the matter is—as the government concedes—"[t]his was far from being a straight verdict for the government." RB.96 n.28. The government is correct—as to several counts where jurors found the aggravators proved, they nevertheless rejected the government's argument that aggravation outweighed mitigation, and refused to impose death. Add.95–96. The jurors found significant mitigating evidence of Tsarnaev's background and upbringing, his youth, his lack of any criminal history or violence, and the ominous early radicalization and influence of his older brother Tamerlan. Add.90–92. Given the 21 mitigating factors found, the government cannot prove beyond a reasonable doubt that absent this emotional victim impact testimony from 11 witnesses not a single juror could reasonably have relied on this mitigation to give life on the six counts for which the jurors imposed death.

A new penalty phase is required.

VIII.

Admission Of The Fruit Of Tsarnaev's Coerced Confession Without A Judicial Determination Of Voluntariness Or An Independent Source Violated The Fifth Amendment.

FBI agents ignored Tsarnaev's 11 requests for counsel and elicited self-incriminating statements from him while he lay in a hospital bed in critical condition, handcuffed and intubated, medicated with opioid painkillers, and recovering from a gunshot wound to the face. Investigators mined his statements for a lead on surveillance video showing that 20 minutes after the bombings, Tsarnaev bought milk at a Whole Foods. The District Court admitted the video without requiring the government to prove the confession's voluntariness or an independent source. Prosecutors invoked the video in each of their jury arguments, emphasizing that by shopping for groceries so soon after the bombings, Tsarnaev demonstrated a "callous and indifferent" character that merited a death sentence.

In response, the government does not now defend the confession's voluntariness. Nor does the government disagree that introduction of the fruit of this coerced confession would violate the Fifth Amendment's Due Process and Self-Incrimination Clauses. Instead, the government offers a smattering of reasons to avoid reaching the merits of Tsarnaev's constitutional claim. None is convincing. Tsarnaev's claim is neither waived nor untimely. The defense reasonably relied on the government's promise not to use the confession, then

objected once the breach of that promise became apparent. The current record does not permit this Court to find that the video had an independent source, and even if considered, the government's 11th-hour extra-record proffer does not carry that burden. Prosecutors' repeated use of the video to urge the jurors that Tsarnaev was and would remain remorseless, and to refute the critical mitigating factor that Tamerlan's influence drove these crimes, preclude a determination that the Fifth Amendment error had no effect on Tsarnaev's death sentence.

A. Tsarnaev preserved this claim. In the alternative, reliance on the government's promise not to use the confession supplies good cause for the defense's mid-trial objection.

1. Tsarnaev preserved this claim.

The government argues that Tsarnaev's claim is waived or untimely because the defense did not contest the admission of the Whole Foods video until after the video came into evidence. RB.302–07. To the contrary, Tsarnaev preserved this claim by moving to bar any use of his involuntary hospital confession, then renewing his request for a voluntariness ruling when "needed" (20.A.9258)—that is, when the government's derivative use of the confession became clear.

Pretrial, Tsarnaev moved to suppress his confession as involuntary. 23.A.10489. By its nature, that motion sought suppression of the confession's fruits as well. "[T]hose subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence

derived from their statements) in any subsequent criminal trial." United States v. Patane, 542 U.S. 630, 640 (2004) (plurality op.). "[T]he Self-Incrimination Clause contains its own exclusionary rule," and "[u]nlike the Fourth Amendment's bar on unreasonable searches, . . . is self-executing." Id. The text of the Fifth Amendment itself dictates the exclusion of an involuntary statement's fruits. See id.; Chavez v. Martinez, 538 U.S. 760, 769 (2003) (plurality op.); Portash, 440 U.S. at 459; Mincey v. Arizona, 437 U.S. 385, 398 (1978). Suppressing a coerced confession but admitting its fruits would not effectuate those Fifth Amendment guarantees, and would serve little practical purpose.

Tsarnaev's motion contested "'[a]ny use'" of the confession. 23.A.10494 (quoting Mincey, 437 U.S. at 398); see also 23.A.10496 ("'[S]tatements obtained as these were cannot be used in any way.'") (quoting Mincey, 437 U.S. at 402). The government vowed not to "use Tsarnaev's statements in its case-in-chief at trial or sentencing." 23.A.10535. The District Court thus "resolved" the motion as "denied without prejudice," but "subject to renewal as needed." 20.A.9258.

During trial, renewal became necessary. The government introduced the video during its guilt-phase case-in-chief. 10.A.4469. Then, the government elicited from FBI Special Agent Chad Fitzgerald that investigators had retrieved the video based on "information . . . from a witness that the people involved stopped at a Whole Foods." 11.A.4704. Until that live testimony, the government

had never disclosed that the video was discovered because of a witness's statement. That testimony, for the first time, raised the possibility that the witness was Tsarnaev himself. Tsarnaev therefore renewed his request for a voluntariness determination, arguing that the video appeared to be the "fruits" of his confession. 21.A.9725–26. That is, he "renew[ed]" his motion once the derivative use of his confession meant that a voluntariness ruling was "needed." See 21.A.9726.

The government counters that the District Court's invitation to renew the suppression motion "did not excuse Tsarnaev from his obligation to challenge the Whole Foods video before trial." RB.304. The "basis for Tsarnaev's 'fruits' argument was reasonably available" pretrial, the government says, and Fitzgerald's testimony "did not materially add to the information . . . that defense counsel already had." RB.303. This riposte ignores the effect of the government's commitment not to use Tsarnaev's confession, as understood in real time. It further ignores the parties' unequal access to the necessary information: only the government knew, or could know, whether fruits of the hospital confession existed.

The District Court concluded that the government's promise "resolved" Tsarnaev's motion to suppress and obviated a voluntariness determination. 20.A.9258. That conclusion, and the parties' acquiescence therein, makes sense only if the government's promise, like Tsarnaev's motion, implicitly reached the confession's fruits. Only a complete commitment to make neither direct nor

derivative use of the confession would have mooted Tsarnaev's motion. If the Court had held Tsarnaev's confession involuntary, suppression of the confession's fruits would have followed "automatic[ally]." See Patane, 542 U.S. at 640. But the Court never decided voluntariness, contrary to the requirements of 18 U.S.C. § 3501(a) and Jackson v. Denno, 378 U.S. 368, 394 (1964). (Indeed, the government had conceded that the Court could not do so without an evidentiary hearing. 23.A.1051.) The Court therefore had discretion to pretermit the voluntariness decision only if there was no prospect that the government would introduce the confession's fruits. If there was, then § 3501(a) mandated a pretrial judicial determination of voluntariness. Only the government knew whether there was such a prospect, and the government did not disclose one.

The colloquy that ensued when defense counsel objected to the introduction of the video confirms that the District Court shared this understanding. Counsel observed: "Because the issue of voluntariness has not been resolved, the issue of fruits remains a potentially live one unless the government can show inevitable discovery, independent source and the like." 21.A.9726. When a prosecutor represented that the Whole Foods tip had come from "somebody else entirely," the Court responded: "As long as that person didn't have it from the statement." 21.A.9727. Indeed, the Court cautioned the government to "be . . . particularly sensitive to the source of that kind of information, that it does not trace back to

those statements." 21.A.9728. The Court shared the defense's assumption that Tsarnaev's hospital confession could not serve as the source for trial evidence.

On that understanding, the renewed mid-trial motion was timely because the "need[]" for a voluntariness ruling did not arise until Fitzgerald testified that the Whole Foods tip came from a "witness" who could have been Tsarnaev. Before that, the defense had no reason to scrutinize the discovery for hints of a taint that the government had said was not there. The government minimizes Fitzgerald's testimony with a rhetorical question: "Where else, after all, would the tip have come from if not a 'witness'?" RB.303. The answer is, any number of possible sources, all of which yielded inculpatory evidence here: cell-site location information from Tamerlan's phone, public surveillance video footage, or a canvass by the thousands of law enforcement officers involved in investigating the bombings. Fitzgerald's mention of an unidentified "witness," as opposed to a non-human source, first alerted defense counsel to the possibility that the video derived from Tsarnaev coerced confession, and justified counsel's mid-trial objection.[40]

[40] United States v. Bashorun, 225 F.3d 9, 13 (1st Cir. 2000) (cited at RB.304), is inapposite. There, "[t]he legal theories Bashorun advance[d] on appeal" in support of suppression "were never raised in the district court," so that Bashorun's appellate claim rested upon an "altogether different theory." Id. Here, by contrast, Tsarnaev has consistently argued that (i) his hospital confession was involuntary, and (ii) the Whole Foods video was the confession's fruit. The possibility that a mid-trial suppression ruling "'could prevent the government from appealing,'" RB.304 (quoting United States v. Castro-Vazquez, 802 F.3d 28, 32 (1st Cir. 2015)), results from the government's litigation conduct, not Tsarnaev's. The

2. Reliance on the government's stipulation constitutes good cause for the timing of the defense's mid-trial objection.

For similar reasons, the defense's reliance on the government's commitment not to use Tsarnaev's confession supplies good cause for any waiver or untimeliness. Fed. R. Crim. P. 12(c)(3) provides that a court may consider an "untimely" "objection" or "request" "if the party shows good cause." This Court has "interpreted the good cause standard to require a showing of both cause (that is, a good reason for failing to file a motion on time) and prejudice (that is, some colorable prospect of cognizable harm resulting from a failure to allow the late filing)." United States v. Santana-Dones, 920 F.3d 70, 81 (1st Cir. 2019).

A defendant's reliance on a government representation or stipulation provides cause to excuse the belated presentation of a constitutional claim. See, e.g., Strickler v. Greene, 527 U.S. 263, 289 (1999) (finding cause to excuse procedural default of Brady claim where habeas corpus petitioner "reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose"); Robinson v. Ignacio, 360 F.3d 1044, 1054 (9th Cir. 2004) (finding cause where habeas petitioner's "reliance on the State's actions and on the stipulations" not to raise procedural defenses "was reasonable"). Here, Tsarnaev

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government made tactical decisions to avoid litigating voluntariness pretrial, then to resist Tsarnaev's request for documentation of its independent-source assertion mid-trial. That course assumed the risk of an unfavorable suppression ruling after jeopardy had attached.

relied on the reasonable understanding, shared by the District Court, that the government would use neither his hospital confession nor its fruits.

Tsarnaev also suffered prejudice. He made a powerful (and in this Court, uncontested) showing that his confession was involuntary. See OB.363–68. There is a more than "colorable prospect" that the video stemmed from that confession and should have been suppressed. See OB.370–75; post § VIII.B. And he has demonstrated that the government's extensive use of the video with respect to central aggravating and mitigating factors affected the verdict. See OB.375–79; post § VIII.C. Accordingly, Tsarnaev has established good cause.

3. The District Court lacked discretion to relieve the government of its burden to prove an independent source.

Repackaging its waiver argument, the government suggests that "[g]iven the untimeliness" of Tsarnaev's request for documentation, "it was within the district court's discretion to deny it." RB.306. The request's timing was reasonable, as just explained. Moreover, the government misstates the facts in several respects. Tsarnaev's demand for documentation was not "[h]is only explicit request for relief." RB.305. He also sought a voluntariness determination, which the District Court never made. 21.A.9726. Nor had "information about the tip" "been provided in discovery." RB.305. The defense did not have the tip in the Orion database (contra RB.305–06 & n.69), and the government did not produce the documents purporting to identify Katherine Russell as the tipster until 2019, in

connection with a motion to supplement the record made after the filing of Tsarnaev's opening brief. See DE.1772–1 ¶¶ 4–5; DE.1772–3; post § VIII.B.

Tsarnaev's challenge to the voluntariness of his confession obliged the District Court either to decide that issue pretrial, see § 3501(a), or to pretermit the issue because the government proved an independent source. To take the latter course, the Court needed verifiable proof, not just the prosecutor's unsworn representation. See, e.g., Corrada-Betances v. Sea-Land Serv., Inc., 248 F.3d 40, 43 (1st Cir. 2001). The response brief cites no decision relieving the government of its burden to prove an independent source before admitting evidence that flows from an antecedent constitutional violation. The lone relevant authority, United States v. Gomez (cited at RB.306–07), turned on the fact that the defendant bore the burden (to establish Fourth Amendment standing), and had forgone an opportunity to offer evidence that was "available" and "known to defense counsel" pretrial. 770 F.2d 251, 253 (1st Cir. 1985). Here, the situation is reversed: the government bore the burden, and any proof that the Whole Foods video had an independent source lay in the government's hands.

B. With or without the government's supplementary materials, this Court cannot find, in the first instance, that the Whole Foods video was genuinely independent of Tsarnaev's coerced confession.

In another attempt to avoid a merits ruling, the government contends that "Katherine Russell, not Tsarnaev, provided the tip that led investigators to search

for video evidence from Whole Foods stores in Cambridge." RB.307.

As the government acknowledges, this contention relies, in full, on extra-record material. RB.294 n.65. In an effort to do now what it should have done below (substantiate the prosecutor's independent-source assertion), the government has moved the District Court, pursuant to Fed. R. App. P. 10(e)(2)(B), to supplement the record with seven documents never presented to that Court. DE.1772. Two of these documents (the only two identifying Russell as the tipster) had never been presented to the defense and were created during this appeal. DE.1772–1 (Declaration of FBI Supervisory Special Agent Timothy D. Brown); DE.1772–3 (Brown's recreation of report in Orion tips database). As Tsarnaev explained below, the motion to supplement is meritless: Rule 10(e) "'is not a procedure for putting additional information, no matter how relevant, before the court of appeals that was not before the district court.'" DE.1774, at 1 (quoting Belber v. Lipson, 905 F.2d 549, 551 n.1 (1st Cir. 1990)). Precedent requires this Court to disregard the government's post-hoc showing. United States v. Muriel-Cruz, 412 F.3d 9, 12 (1st Cir. 2005) ("Absent extraordinary circumstances, . . . we consult only the record extant at the time the district court rendered its decision.").

Were this Court to consider the government's supplemental submissions, remand would still be necessary. Tsarnaev does not concede the submissions' accuracy. DE.1772–3, the Orion report that purports to identify Russell as the

tipster, is not an original but a reconstruction that Brown prepared in 2019. DE.1772–3 ¶ 4. Brown had to recreate the report (from unspecified "FBI records") because the original Orion database "no longer exists." Id. The formatting, headings, and timestamps on Brown's reconstruction differ from those on the redacted report produced to the defense in discovery. Compare DE.1772–2 with DE.1772–3. The defense has the right to test the credibility of Brown's declaration through cross-examination, and the reliability of his reconstruction through inspection of the "FBI records" that he consulted. This Court does not determine witness credibility or the reliability of documentary evidence in the first instance. E.g., United States v. Reda, 787 F.3d 625, 632 (1st Cir. 2015).

Even if accurate, the submissions do not disprove Tsarnaev's Fifth Amendment claim. According to the government, on April 21, 2013, Russell told an FBI agent that Tamerlan Tsarnaev shopped for milk at a Whole Foods on River Street in Cambridge after the bombings. DE.1772–3. Later that day, ATF agents attempted to obtain surveillance footage from the Whole Foods at 340 River Street, but recovered nothing. DE.1772–7. As the government agrees, Russell's tip led investigators to a dead end: "the wrong Whole Foods location." RB.308. [redacted] SAdd.10, 15–16. And on April 23, FBI agents visited the right Whole Foods, on Prospect Street in

Cambridge. 10.A.4466–69. It is a reasonable inference that the investigators learned which Whole Foods Tsarnaev had visited during that overnight session. (It is easy to envision how the questioning went: "Did you stop at a Whole Foods after the Marathon? Which one?" See SAdd.10.)

Most important, in the independent-source context, this Court has explained that even if the record "'provide[s] [some] support for the Government's position,' . . . 'it is the function of the District Court rather than the Court of Appeals to determine the facts.'" United States v. Rose, 802 F.3d 114, 124 (1st Cir. 2015) (quoting Murray v. United States, 487 U.S. 533, 543 (1988)). "This is true even where a court of appeals could theoretically cobble together varying aspects of the record to infer" an independent source. Id. The government elected not to resolve this issue below, in the forum best suited for resolving factual disputes. Instead, the government now asks this Court to credit untested evidence and resolve its many ambiguities against the defense. Precedent blocks that course. E.g., id.[41]

[41] In a half-sentence, the government asserts that the Whole Foods video "would inevitably have been discovered if Tsarnaev's statement had not occurred." RB.309. This undeveloped argument is waived. See Zannino, 895 F.2d at 17; Caraballo-Cruz, 52 F.3d at 393. It also lacks any evidentiary support (for example, testimony that the agents planned to search every Whole Foods in the Boston area). To prove inevitable discovery, the government "may not rely on speculation but rather must meet this burden of proof based on 'demonstrated historical facts capable of ready verification or impeachment.'" United States v. Ford, 22 F.3d 374, 377 (1st Cir. 1994) (quoting Nix v. Williams, 467 U.S. 431, 444 n.5 (1984)).

C. Having made repeated use of the Whole Foods video to prove a critical aggravating factor and dispute Tsarnaev's chief mitigating factor, the government cannot show that the error was harmless beyond a reasonable doubt.

Finally, the government contends that any error was harmless beyond a reasonable doubt. RB.309–12 (citing § 3595(c)(2)). The Whole Foods video "was relevant only to whether Tsarnaev lacked remorse immediately after the bombings," the government says, a point not only proved by "overwhelming" evidence, but "affirmatively conceded" by the defense. RB.309, 311. According to the government, the video "had no bearing" on the only disputed question: whether "Tsarnaev became remorseful later, while he was in custody." RB.309.

That argument mischaracterizes the government's use of the Whole Foods video below. Prosecutors urged the jurors to consider the video not just as evidence of Tsarnaev's mental state "immediately after the bombings," but as proof that he remained a callous, indifferent terrorist two years later. For example, in the penalty-phase rebuttal, a prosecutor invoked the video to dispute the defense's prediction that Tsarnaev would "become remorseful over time," and would "spend the rest of his life thinking about his crimes" while serving a life sentence:

> Maybe he'll leave behind his memories of Martin Richard, Krystle and Lingzi Lu in the same way he left them dying on the street when he went shopping at Whole Foods. . . .

> The callousness and indifference that allows you to destroy people's lives, to ignore their pain, to shrug off their heartbreak, that doesn't go away just because you're locked up in a prison cell. It's what enables you to be a terrorist, and it's what insulates you from feelings of remorse.

19.A.8801; 19.A.8802–03.

One transcript page later, the prosecutor amplified this theme, arguing that Tsarnaev's "actions . . . afterwards at Whole Foods," among others, "tell you all you need to know about the kind of person he became," namely, someone who "deserves the death penalty . . . because he's inhumane." 19.A.8804. Likewise, during the penalty-phase opening, a prosecutor had argued that Tsarnaev's "cruel character" could be seen in "the way that he murdered and in his own reactions to those murders," in particular, through "the milk-buying video." 16.A.7085–86. And it was Tsarnaev's "callous and indifferent" "character," the prosecutor said, "that makes the death penalty appropriate and just." 16.A.7084. Tsarnaev "was and is unrepentant, uncaring, and untouched by the havoc and the sorrow that he has created." 16.A.7086. Throughout, the government deployed the video as evidence of persistent character traits—callousness, hatefulness, remorselessness—that warranted a death sentence. Faced will these arguments, all 12 jurors found that Tsarnaev "demonstrated a lack of remorse." Add.88.

The government made wider-ranging use of the Whole Foods video still, for example, to refute key mitigating factors. A prosecutor asked: "If you are capable of such hate, such callousness that you could murder and maim nearly 20 people

and then drive to Whole Foods and buy milk, can you really blame it on your brother for giving you some propaganda to believe?" 15.A.6972. In line with that argument, only three jurors found proved the mitigating factors relating to Tamerlan's influence over Jahar. Add.90–91 (mitigating factors 3, 4, 5, and 7). Similarly, a prosecutor urged the jurors to reject the defense's proof that Tsarnaev "has expressed sorrow and remorse" to Sister Helen Prejean "for what he did and for the suffering he caused." Add.82 (mitigating factor 21, found by only two jurors). The prosecutor pointed to Tsarnaev's "actions . . . at Whole Foods," among others, which "speak[] louder about the appropriate punishment in this case" than "any testimony from any witness." 19.A.8804; see 19.A.8800–02.

The government's effort to show that sufficient untainted evidence proved Tsarnaev's lack of remorse after the bombings, RB.309–11, or that defense counsel conceded the matter, RB.311–12, misses the point. Section 3595(c)(2) does not call for a sufficiency inquiry. To assess the harmlessness of the erroneous introduction of penalty-phase evidence derived from a constitutional violation, this Court does not ask whether other "legally admitted evidence was sufficient to support the death sentence." Satterwhite, 486 U.S. at 258. Rather, this Court evaluates "whether the [government] has proved 'beyond a reasonable doubt that

the error complained of did not contribute to the verdict obtained.'" Id. (quoting Chapman, 386 U.S. at 24).[42]

On that point, the government's own litigation conduct offers the best evidence that the Whole Foods video mattered. See Clemons v. Mississippi, 494 U.S. 738, 753 (1990); United States v. Serrano, 870 F.2d 1, 9 (1st Cir. 1989). The government called the jurors' attention to the Whole Foods video in every single one of its arguments. 10.A.3949–50 (guilt-phase opening); 15.A.6889 and 6903 (guilt-phase closing); 15.A.6972 (guilt-phase rebuttal); 16.A.7086 (penalty-phase opening); 19.A.8708 and 8721–22 (penalty-phase closing); 19.A.8803–04 (penalty-phase rebuttal). The video prompted government arguments that Tsarnaev was "hate[ful]," "callous," "indifferent," "cruel," "remorse free," and "inhumane." 15.A.6972; 16.A.7084–86; 19.A.8708; 19.A.8803–04. This repeated invective, made in explicit reference to the Whole Foods evidence, had a powerful effect on the jurors' penalty-phase decision.

[42] Jones v. United States, 527 U.S. 373 (1999) (cited at RB.292, 309) is inapposite. Jones addressed the potential effect of "loosely drafted" non-statutory aggravating factors that the defendant argued were duplicative, vague, and overbroad—but, all agreed, pertained to valid aggravating considerations ("victim vulnerability and victim impact"). Id. at 402; see id. at 398–402. Jones held any error harmless because "the result would have been the same had the invalid aggravating factor[s] been precisely defined." Id. at 402. Jones did not address the error alleged here: the admission, in aggravation, of unconstitutionally obtained evidence. Satterwhite, not Jones, supplies the applicable standard of review for this claim.

Moreover, even after the jurors found the lack-of-remorse aggravator proved, each individual juror had to decide what weight to give the aggravator in the overall sentencing calculus. E.g., 19.A.8695, 8698–99. The video allowed the government to argue that Tsarnaev's remorselessness carried dispositive significance. During penalty-phase closing, just after discussing the video in strident terms ("As the defendant sat at home drinking his milk . . . the heartbreaking love of a mother comforting her dying child played out in the heart of Boston," 19.A.8722), a prosecutor argued that the lack-of-remorse aggravator, standing "[a]lone," "sufficiently outweigh[ed] any mitigating factors to justify your imposition of a sentence of death." 19.A.8723–24. And during penalty-phase rebuttal, a prosecutor contended that the most probative evidence of the proper penalty was Tsarnaev's "actions," including those "at Whole Foods." 19.A.8804. The prominence of the Whole Foods video in the government's jury argument reflects the government's own view of the video's significance.

IX.

The Government Used Inadmissible Evidence, Inflammatory Audiovisual Presentations, And Improper Arguments To Stoke Anti-Muslim Bias And Incite The Jurors To Vote For Death Based On Passion And Prejudice.

The jurors who would decide whether Tsarnaev should live or die had to weigh competing evidence about his capacity for remorse and his risk of future danger. Either verdict meant that Tsarnaev, a teenager without any criminal history, would die inside a maximum-security federal prison. In urging the jurors to disregard his youth and the aberrant nature of his conduct, the government was able to point to legitimate evidence of Tsarnaev's character: for example, the crime itself, and the message he wrote on the boat in which he was captured. But the government went further, crossing the line with misleading, emotionally evocative images and sounds, and by baselessly tying Tsarnaev to ISIS, a barbaric terrorist group that committed atrocities while Tsarnaev's trial was ongoing. The government's misconduct irreparably tainted the death sentences, rendering them constitutionally unreliable.

A. The government's penalty-phase opening display of a line of five enlarged photographs, each atop an easel, with two joyful images of the homicide victims on each end, and Tsarnaev raising his middle finger between them, was prosecutorial misconduct.

The government contends that by raising his middle finger at a cell-block surveillance camera for a split-second, three months after the bombings, Tsarnaev intended a specific communication: that as he awaited arraignment in a courthouse

cell block, he continued to believe his crimes at the Boston Marathon and in its aftermath were justified by jihad, and he therefore still lacked remorse. RB.337–38. Yet the government also tries to persuade this Court that when the prosecutor chose to display a blowup of the screenshot of Tsarnaev making the gesture, flanked by large photographs of the homicide victims, and called it his "one more message to send," she did not intend to convey that he was sending his "message" to the victims. RB.337. The government disregards the natural meanings of both images: Tsarnaev's gesture and its own array.

Raising one's middle finger has a universal meaning. When the prosecutor placed a photo of Tsarnaev raising that finger in the middle of photos of the four homicide victims, then told the jurors that Tsarnaev had "one more message to send," the implication could not have been clearer. The government concedes that the prosecutor displayed these five powerful photographs in this manner. RB.334–35. The government made purposeful choices whether and how to display certain photographs of the victims and of Tsarnaev during the opening statement. Those choices twisted the meaning of Tsarnaev's gesture and aimed it towards the victims, rather than towards a mirrored cellblock camera.

Faced with trying to explain this array—contemporaneously described by the *Boston Globe* as "Flipping Off the Dead" (see OB.393)—the government argues that it is akin to an "ambiguous remark." RB.338 (citing Donnelly v.

DeChristoforo, 416 U.S. 637, 647 (1974)). This Court, the government urges, "should not lightly infer" either that the "prosecutor intend[ed]" the five-photograph arrangement to communicate "its most damaging meaning" or that the jurors inferred the same, given the "plethora of less damaging interpretations." Donnelly, 416 U.S. at 647. But it was the prosecutor who specifically arranged the photographs in this manner, chose to leave Tsarnaev's photograph covered until the very end, and, clarifying any ambiguity, explained that Tsarnaev had "one more message to send." 16.A.7090. The images the government displayed were positioned in the same size, on the same easels, and arranged in a line with the innocent victims juxtaposed with their bird-flipping killer. The inference that these images were related to one another is not only the most damaging meaning, but also the most obvious.

Once the prosecutor removed the black cloth to complete the arrangement, the jurors hardly had a "plethora" of other less nefarious inferences to choose from. If the government had sought to disaggregate the images, while still using all of them, the possibilities were limitless: the victim images could have been themselves draped over or set down; the cell-block image of Tsarnaev could have been placed apart from them; they could have been presented in different sizes or shapes or in any other manner that did not employ the stark visual cue that they were being compared to one another. Indeed, the government's contention that

Tsarnaev's briefly raised middle finger in the courthouse cell block was intended as a continuing embrace of jihad, rather than its conventional meaning—one the government concedes (RB.339) is "hardly an uncommon sight for most Americans"—requires a stretch of the imagination.

By arranging the photographs in this way and calling the gesture Tsarnaev's "message," the government took on the very risk that the defense cautioned against in a pre-penalty phase motion hearing. As set forth in the Opening Brief, Tsarnaev had objected to any use of the screenshot, arguing that taken out of context—a momentary gesture in the midst of four uneventful hours alone in a holding cell—it created "a completely false image of what is happening," and was more prejudicial than probative under the FDPA. OB.390; Add.359, 367. When that objection was overruled, Tsarnaev objected specifically to the use of the image in the government's opening statement; the District Court again overruled. Add.367. And after the prosecutor displayed the images on the easels in this particular arrangement, Tsarnaev renewed his evidentiary objection—as the government concedes (RB.336)—calling the prejudice from the array "greatly enhanced" by "its juxtaposition between" the victims. OB.392–93; Add.376–77.

Thus, the government's claim that this argument is unpreserved, RB.336, is baseless. According to the government, after Tsarnaev made and lost an evidentiary objection, then made and lost a narrower objection to the use of the

image in the opening statement, and finally, renewed his objection following the opening statement, he was then required to specifically object to the conduct, already permitted by the District Court, using the words "prosecutorial misconduct." RB.336. What's more, after the District Court overruled his objection, Tsarnaev should have taken his loss to the next level, moving for a mistrial. Id. Such an exercise in futility is neither reasonable nor required.

As this Court has held under the same circumstances, "The government . . . argues that Auch's objections to the prosecutor's irrelevant questions cannot preserve the present grounds for appeal—namely, prosecutorial misconduct. We cannot agree." United States v. Auch, 187 F.3d 125, 129 (1st Cir. 1999) (citations omitted). When the grounds for the evidentiary objection and its context are clear, and forecast the same harm as that raised on appeal, the issue is preserved. Id.; see also United States v. Meserve, 271 F.3d 314, 325 (1st Cir. 2001) ("According to the government, even if a witness's answer was given pursuant to a district court's order overruling an objection, the party opposing admission of the evidence must move to strike the witness's answer to escape plain error review. Modern trial practice is unreceptive to such procedural redundancies.").

The government's reliance on United States v. Montas, 41 F.3d 775, 782–83 (1st Cir. 1994) (cited at RB.336), is misplaced. In Montas, the trial objections were essentially form objections (leading, speculation, and "best we can

understand . . . relevance"). 41 F.3d at 782. But the error claimed on appeal was that the testimony was not a proper subject of expert testimony under Fed. R. Evid. 702. Id. at 783. Montas has no application here, where the harm flagged by the evidentiary objection and the resulting prosecutorial misconduct are one and the same: that the government took an image out of context, placed it into a more prejudicial context, and in so doing, misled the jurors.

The government's pre-planned opening statement array, in the penalty phase of a capital trial, used to urge the jurors to sentence Tsarnaev to death, was a deliberate error that went uncorrected, and "'so poisoned the well' that the trial's outcome was likely affected." United States v. Azubike, 504 F.3d 30, 39 (1st Cir. 2007) (quoting United States v. Joyner, 191 F.3d 47, 54 (1st Cir. 1999)). The emotional gut punch of the prosecutor's maneuver cannot be overstated. "An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk . . . that the entire panel may be tainted." Arizona v. Washington, 434 U.S. 497, 512 (1978).

Finally, the prosecution reminded the jurors about this ineradicable image throughout the penalty phase, via witness testimony (16.A.7292–96), and in its closing rebuttal argument, including the prosecution's very last words before deliberations, when Tsarnaev could not respond. 19.A.8804. The prosecutor

concluded that Tsarnaev's "actions . . . in this courthouse on the day of his arraignment"—not the two years without a disciplinary infraction in pretrial detention, nor his calm and respectful conduct during the trial itself, but the split-second raising of his middle finger at a holding cell camera—were "the best evidence you have about who the defendant became." OB.393–94; 19.A.8804. By bestowing such importance on this image, the government invited jurors to recall the way it was first revealed to them: improperly flanked by photographs of the happy victims in life, sending them his "message."

B. The government intentionally courted Islamophobia during the guilt phase, tainting the jurors' penalty determination.

The government's use of misleading evidence was not limited to the penalty phase photographic array; the government laid the groundwork for a death sentence fueled by passion and prejudice by courting Islamophobia during the guilt phase. By having its expert Matthew Levitt improperly link Tsarnaev to ISIS, a group it concedes posed a threat only after the Boston Marathon attacks, and by scoring gruesome images of the Marathon victims with an unrelated Islamic song, the government obtained death sentences through a process that was irreparably tainted by anti-Muslim bias.

1. The District Court improperly admitted testimony about ISIS, a group notorious for vicious acts at the time of trial, with which the government knew Tsarnaev had no connection.

The government concedes the lack of any "direct connection between Tsarnaev and ISIS," and further acknowledges that the threat posed by ISIS was generally "after the Boston Marathon attacks." RB.319–20. Yet, in spite of Levitt's testimony that ISIS is "a group that in the region in the Middle East is fighting with al-Qaeda" (Add.243), the government lumps the two groups together under a supposed umbrella of the "global jihad movement" in a post-hoc effort to justify Levitt's inadmissible testimony. RB.314–17. The only connection between Tsarnaev and ISIS is that they both purport to be inspired by Islam.

On the one hand, the government contends that Levitt's ISIS testimony was relevant to "help the jury understand jihadist materials" (from other groups and speakers) found on Tsarnaev's computer that were probative to his motive. RB.316. On the other hand, the government asserts that the ISIS testimony was not unduly prejudicial because "there were no graphic descriptions of ISIS violence and no ISIS videos, photographs, or audio." RB.317. These arguments are two sides of the same coin. Tsarnaev did not have ISIS media on his computer, because, as discussed in the Opening Brief, at the time of his crimes, ISIS did not meaningfully exist. OB.396–399. The lack of any such media on Tsarnaev's computer is why Levitt's testimony about the group would not—indeed, could

not—"help the jury understand" Tsarnaev's motives. Rather, the sole purpose of the ISIS testimony was to link Tsarnaev to this infamous group.

The government minimizes the impact of the ISIS testimony by noting that it was confined to two transcript pages that were "unemotional" and "academic in tone." RB.321–22. The damage was done in two pages because ISIS was so well-known and so heinous. The ISIS-inspired Charlie Hebdo massacre occurred on the second day of Tsarnaev's jury selection, and was discussed during voir dire. See 1.A.271 (juror advises Court that he saw a news story about Charlie Hebdo); 8.A.3243, 3340 (juror changed his Facebook profile image in solidarity with Charlie Hebdo victims). At the same time, the media market was saturated with coverage of ISIS beheadings, rapes, and its publication of a "kill list" of American soldiers. OB.400. Levitt did not have to give graphic descriptions or show a video to taint Tsarnaev's jurors. As the prosecutor correctly observed: "we've all heard of [] ISIS." 13.A.5894.

The government concedes that the ISIS evidence had the potential to impact the jurors' findings on whether Tsarnaev posed a future danger in prison—the subject of a contested mitigating factor. RB.319. Although there was no evidence showing that Tsarnaev would be dangerous in a maximum-security prison, only one juror found in mitigation that he would not be. See Add.92. By connecting Tsarnaev to the "threat posed by the global jihad movement after the Boston

Marathon attacks" (RB.319), the government acknowledges that even absent any factual basis for doing so, jurors may well have connected Tsarnaev to ISIS based on the prosecution expert's testimony.

The government is also incorrect to argue that the District Court is owed any deference in its purported balancing of the risk of prejudice with the relevance of the ISIS testimony. RB.319–20. The District Court did remind the government before the testimony that "[Rule] 403 is an important consideration" and warned the government not to "step too far on this." 13.A.5875. But when the issue actually presented itself during the witness's testimony, the District Court did no balancing whatsoever, making no "findings on prejudice and probativeness." United States v. Mehanna, 735 F.3d 32, 62 (1st Cir. 2013).

2. The government committed prosecutorial misconduct when it scored a closing argument PowerPoint presentation of images of the wounded and dead at the Boston Marathon with an unrelated Islamic song.

The government's guilt-phase closing argument PowerPoint presentation twice showed jurors eight gruesome images of the Marathon victims, the second time with an Islamic soundtrack. The government contends that because the images and the audio were each separately admitted into evidence, combining them for the jurors was proper. RB.323–30. The government is mistaken. At trial, the government offered no proof that the song, or nasheed, that it used during its closing argument had any significance at all to Tsarnaev—let alone that it had

ever been played by him or was connected in any way to the capital crimes. The song's value in the prosecution's presentation was not its evidentiary meaning, but its emotional heft. It was designed to inflame the jurors' fears and passions, and it succeeded.

The government ascribes an evidentiary value to the nasheed that simply does not exist. First, the government notes that the song was saved to multiple folders on the Tsarnaev home computer. RB.329; 1.Supp.App.46. But the government overlooks that each of those four files were created in 2011, and the government presented no evidence that any of them had been so much as accessed since January 14, 2012, over a year before the bombings, when these files were accessed by an unknown user. 1.Supp.App.47–48. Worse, the government makes the misleading assertion that this nasheed is meaningful because it was Tsarnaev's "portable inspiration," noting that "the Tsarnaevs interrupted their carjacking of Dun Meng to drive back to Watertown to get their CD containing nasheeds" and "then played the CD in Dun Meng's car while the carjacking was in progress." RB.329–30; 11.A.4964. The government made this same argument to the jurors. 15.A.6910. But the government's claim is false: the nasheed the government played during its closing argument was not on the CD retrieved from Watertown and played in Dun Meng's car. 1.Supp.App.v (audio file containing GX–1148).

Absent any connection between the nasheed played in closing argument and the crime itself, the government offers two justifications for the song's use. First, the song contained the word "ghuraba," an Arabic word meaning "stranger," that Tsarnaev chose as his username on Twitter. RB.323, 327, 329. Second, the song was a religious devotional. RB.323.

The first justification strains credulity. Nothing in law, logic, or common sense supports the government's conclusion that because the nasheed used the Arabic word for "stranger," which Tsarnaev also used on Twitter, the government was therefore justified in playing the song over images of the death and destruction caused by the bombings.

The second purported justification suffers the same infirmity. It assumes that any Islamic religious material must have been Tsarnaev's terrorist inspiration. This claim has no basis in the record and is deeply problematic in its assumptions.

The best evidence of the government's motivation in using the nasheed came earlier in the trial. During the guilt phase, Dun Meng described the music the Tsarnaev brothers played in his car. 11.A.4964. Meng said the music was "a little bit weird. It sounds like religious." Id. But the prosecutor pressed on, asking Meng, "How did that make you feel when that music was being played in your car?" Id. The witness replied, "Nervous." Id. Similarly, the government chose a foreign-sounding Islamic song, juxtaposed with horrific images of the dead and

dying, to unnerve the jurors. Exploiting religious bias in this way was unconstitutional. See Buck v. Davis, 137 S. Ct. 759, 775 (2017).

The government's argument that the nasheed misconduct did not matter because it was played for 19 seconds is without merit. RB.331. This Court can see and hear the presentation and judge for itself how long those 19 seconds feel. Add.CD.ExcerptPP. The combination of sight and sound was extremely powerful, prompting the defense to move for a mistrial, which the District Court denied. Add.250–51, 254–55.

Last, the government's reliance on 18 U.S.C. § 3593(f) is misplaced. It is true that as required by the FDPA, the District Court instructed the jurors that they could not consider Tsarnaev's religious beliefs in reaching their penalty verdict, and the jury certified that it did not. 19.A.8700; Add.98. Section 3593(f), titled "[s]pecial precaution to ensure against discrimination," was enacted as a prophylactic measure to help safeguard against death verdicts tainted by racial, religious, ethnic, and sex-based discrimination—not to protect those verdicts from meaningful appellate review. Here, the prosecutor's objected-to constitutional errors in showing the audiovisual presentation to the jurors and eliciting testimony about ISIS were so significant they could not be cured by technical compliance with § 3593(f). These errors occurred as part of the government's trial strategy. Jurors' signatures on the back of a verdict sheet did not, in this context, cure the

government's appeals to religious bias. Moreover, bias against disfavored minorities, including religious minorities, is often unconscious. See Smith, 455 U.S. at 221–22 (O'Connor, J., concurring). That risk is especially prevalent where, as here, the government cultivates bias through indirect allusions (an eerie Islamic song, references to an irrelevant Islamic terrorist organization) rather than direct appeals to prejudice. The § 3593(f) certification offers no protection against implicit bias.

Neither were the errors rendered harmless by the general instruction the District Court gave the jurors at the penalty phase not to consider the defendant's religious beliefs or national origin in deciding whether to impose the death sentence. This belated instruction did not address either the slideshow or the ISIS testimony. See United States v. Ayala-Garcia, 574 F.3d 5, 21 (1st Cir. 2009) (holding that the trial court's general instruction "was too mild for the circumstances and thus an inadequate antidote for the misconduct" because it "made no reference to the prosecutor's inaccurate and inflammatory comments"). The prosecutor's inflammatory audiovisual presentation and elicitation of ISIS testimony both spoke to religious beliefs and influenced the jurors' sentencing determinations. Under such circumstances, a general instruction cannot remedy the prosecutor's misconduct.

C. The government's improper bolstering of its case in aggravation, taken together, was not harmless.

The government argues, in essence, that because Tsarnaev committed a horrible crime, none of the improper evidence, considered in isolation, was harmful. RB.320, 333, 339. In the government's view, neither the middle-finger "message," nor the ISIS evidence, nor the nasheed soundtrack could have impacted the verdict in a case where Tsarnaev placed a "bomb next to a row of children and walk[ed] away just before detonating it." RB.339. The government ignores the split penalty verdicts in this case and misstates the legal framework for determining whether the prosecution's misconduct, viewed cumulatively, could be considered harmless. It also begs the question: If the government presented other sufficient, legitimate evidence in aggravation, why did it also gamble by introducing these improper considerations?

While each individual error tainted the process by which the jurors determined whether a young man should live or die, taken together, the impact of the government's misconduct is highly prejudicial. Tsarnaev's jurors rejected the prosecutors' arguments for death on 11 of the 17 death-eligible counts. Add.95–96. The jurors found that the aggravating evidence outweighed the mitigating evidence only as to those counts relating to Tsarnaev's placing of the bomb on Boylston Street. In finding the aggravators proven as to these counts and deciding how much weight to accord the aggravation, is impossible to ascertain whether the

jurors relied on the prosecution's legitimate evidence (the boat message) or its illegitimate evidence (the middle finger "message"). The government cannot show beyond a reasonable doubt that absent its opening-statement array, introduction of improper ISIS evidence, and overlay of religious audio over gruesome pictures in closing, at least one juror would not have found that as to these counts as well, the aggravation did not outweigh the mitigation.

The death sentences must be vacated.

X.

The District Court's Failure To Instruct Jurors That To Impose Death They Must Find The Aggravating Factors Outweigh The Mitigating Factors Beyond A Reasonable Doubt Violated The Fifth And Sixth Amendments.

The government does not contend that the Constitution allows jury findings necessary to the imposition of the death penalty to be made according to a standard of less than proof beyond a reasonable doubt. See Alleyne v. United States, 570 U.S. 99, 108 (2013); Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). Instead, the government quarrels with whether the final weighing determination is a "finding," or, rather, is more akin to a "process" and thus outside the holding of Hurst v. Florida. 136 S. Ct. 616, 622 (2016). RB.342–54. The government asks this Court to hold that the final decision whether the aggravating factors outweigh the mitigating factors is not susceptible to the protections of the Fifth and Sixth Amendments based on this semantic difference between a "finding" and a "process."

The government contends that under Hurst, the only finding necessary for the imposition of a death sentence is the eligibility finding that an aggravating factor exists. RB.346–50.[43] The government offers no justification for why the

[43] This distinction between the eligibility phase of the death-penalty determination and the final weighing stage has been rejected by a majority of the Delaware Supreme Court:

protections of the Fifth and Sixth Amendments regarding jury findings beyond a reasonable doubt should apply at the *eligibility* stage of the death-penalty decision-making process but not at the *weighing* stage. See Rauf, 145 A.3d at 436 (Strine, C.J., Holland, J., and Seitz, J., concurring) ("I am unable to discern in the Sixth Amendment any dividing line between the decision that someone is eligible for death and the decision that he should in fact die.").

The government contends that Kansas v. Carr, 136 S. Ct. 633, 642 (2016), "confirms that the beyond-a-reasonable-doubt standard does not apply to the weighing determination." RB.350. But the Court in Carr held simply that the Eighth Amendment did not require an instruction on the standard of proof for mitigating factors. Carr, 136 S. Ct. at 641–44. With respect to the standard by which the aggravating factors should be weighed against the mitigating factors, the Court noted that the jury in Carr was given an instruction that "makes clear that both the existence of aggravating circumstances and *the conclusion that they outweigh mitigating circumstances must be proved beyond a reasonable doubt*

> I am reluctant to conclude that the Supreme Court [in Hurst] was unaware of the implications of requiring "a jury, not a judge, to find each fact necessary to impose a sentence of death." If those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility.

Rauf v. State, 145 A.3d 430, 464 (Del. 2016) (Strine, C.J., Holland, J., and Seitz, J., concurring).

. . . ." Id. at 643 (emphasis added). Thus, any reading of Carr that suggests that the beyond-a-reasonable-doubt standard does *not* apply to the final weighing stage would be based on dicta.[44]

As the Supreme Court recently reiterated, "one of the Constitution's most vital protections against arbitrary government" is that "[o]nly a jury, acting on proof beyond a reasonable doubt, may take a person's liberty." United States v. Haymond, 139 S. Ct. 2369, 2723 (2019). Surely the same holds true in the even more consequential context of taking a person's *life*. Because the District Court failed to instruct the jurors that to impose death they had to find that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt, Tsarnaev's death sentences must be reversed.

[44] The Carr Court's discussion of the concept of mercy must be read in the context of the facts there; the jury received "mercy" as a mitigating factor to consider. 136 S. Ct. at 643.

XI.

In The Unusual Circumstances Of This Case, The Failure To Instruct The Jurors That Non-Unanimity At The Weighing Stage Would Result In A Life Sentence Instead Of A Retrial Created An Unconstitutional Risk Of Unreliability.

The jurors who decided Tsarnaev's fate were left to speculate that if they were non-unanimous at the final weighing stage, the result would be a retrial. That incorrect assumption was particularly likely here, because the jurors *did* receive instructions about the consequences of non-unanimity at two prior stages of the jury's deliberative process. These circumstances distinguish this case from Jones v. United States, where the jurors received no instruction on the consequence of non-unanimity at any of the stages. 527 U.S. 373, 390–92 (1999).

The government's only substantive answers to this problem are, first, that the jurors' speculations about the lack of an instruction could have led them in a number of different directions, and, second, that Appellant has not shown that any juror was in fact misled. RB.367, 371. The first is true, and supports an unreliability claim under the Eighth Amendment. Beck v. Alabama, 447 U.S. 625, 643 (1980) (holding even where extraneous factors "may favor the defendant or the prosecution or they may cancel each other out," they "introduce a level of uncertainty and unreliability . . . that cannot be tolerated in a capital case."). The second answer derives from applying the wrong standard of review. Because the issue was preserved, the government must show the error harmless on the ground

that there was not an unconstitutional *risk* of an arbitrary, misleading, or coercive effect on one or more jurors. It makes no attempt to do so.

A. This claim is preserved, and *de novo* review applies.

This preserved claim is subject to *de novo* review, and reversal is required unless the error is harmless beyond a reasonable doubt. OB.429, 435. The government contests preservation and contends that plain-error review applies. RB.355, 360. But the government does not dispute that Tsarnaev: (1) tendered an instruction that accurately stated the law that if jurors were non-unanimous at the final weighing stage, the District Court would impose a sentence of life without the possibility of parole (25.A.11595; 25.A.11608–12); (2) objected to the District Court's refusal to issue the tendered instruction (22.A.10336–39); and (3) reiterated his objection after the instructions were read to the jurors but before the jurors were sent out to deliberate. 19.A.8817–21. Instead, the government attempts to recast Tsarnaev's claim on appeal as solely relating to the "confusion allegedly caused by other instructions." RB.357. Here, the grounds for the objection, repeatedly argued by defense counsel below, are that the jurors should be told the truth about the consequence of non-unanimity at the final weighing stage and that, given the extraordinary nature of this case, allowing jurors to incorrectly assume that non-unanimity would result in a retrial would be extremely prejudicial and risk having a coercive effect on potential holdout jurors.

25.A.11608–12; 22.A.10336–39; 19.A.8817–21. In pursuing this same claim on appeal, Tsarnaev does not subject it to plain-error review by making the related argument that the refusal to instruct on the consequence of non-unanimity at the final weighing stage was particularly misleading here because the District Court had accurately informed jurors that non-unanimity at the gateway-factors and aggravating-factors stages would result in a mandatory sentence of life without the possibility of release, rather than the retrial that people generally understand follows a hung jury in criminal cases.[45]

The government's position rests on the false premise that every part of an argument raised on appeal in support of a claim must have been expressly articulated in the trial court for that claim to be deemed preserved. But the government cites no authority in support of such a radical stance. Binding authority is to the contrary. See, e.g., Arthur Andersen LLP v. United States, 544 U.S. 696, 707 n.10 (2005) ("Petitioner plainly argued for, and objected to the instructions' lack of, a nexus requirement. . . . Although the instruction petitioner proposed . . . does not mirror the nexus requirement it now proposes, its actions

[45] The government complains that Tsarnaev "did not object to the instructions governing the 'gateway' and statutory aggravating factors . . . ." RB.361. But because these other instructions were legally correct, there was no reason to object to them. Also, the government can suffer no prejudice from this Court applying the longstanding, basic principle that the instructions must be considered as a whole.

were sufficient to satisfy Rule 30(d)"); United States v. Smith, 278 F.3d 33, 36 (1st Cir. 2002) (holding instructional error adequately preserved where defense counsel requested a particular instruction, objected to court's failure to give it, and on appeal raised additional arguments as to why the failure to give it was error).[46]

B. The government cannot show there was no unconstitutional risk of an arbitrary, misleading, or coercive verdict.

The District Court's instructions, taken as a whole, were affirmatively misleading. They juxtaposed instructions informing jurors that non-unanimity at the gateway- and aggravator-factor stages would lead to a mandatory life sentence with the glaring absence of such an instruction as to the final weighing stage—even though the same was true there. Seeking to dispense with the substance of Tsarnaev's claim in a footnote, the government asserts that it is foreclosed by Jones. RB.361 n.73. But Jones itself recognizes that where jurors could be misled

[46] The cases the government relies on to contend the error here was unpreserved (RB.360–62) are easily distinguished. In United States v. Boylan, 898 F.2d at 248–49, the claim on appeal was that the jury instructions had failed to mention "continuity" as an element of racketeering activity. This Court noted that "[i]n the trial court, appellants' objections were aimed not at the requirement of continuity, but at the supposed need to prove multiple schemes as a prerequisite to mounting a RICO prosecution (an idea now thoroughly discredited)." Id. at 249. The Boylan court then quoted a typical defense objection raised in the trial court and concluded that it "directed the court's attention away from, instead of toward, continuity." Id. Here, by contrast, the defense made it clear to the District Court what instruction they wanted the Court to issue, and why. 25.A.11595; 25.A.11608–12; 22.A.10336–39; 19.A.8817–21. In United States v. Wheeler, 540 F.3d 683, 688 (7th Cir. 2008), unlike here, the defense had not requested the instruction it complained on appeal was not given.

about their role in the sentencing process, the Eighth Amendment may require an appropriate instruction about the consequences of non-unanimity at the final weighing stage. 527 U.S. at 381–82. That is what happened here.[47]

The government emphasizes that the District Court properly instructed jurors about their responsibility to make individual determinations about the appropriate penalty in this case. RB.360, 368–69. But the existence of such a general instruction could not cure the lack of information about the particular outcome if consensus was not reached at the final stage. Cf. Simmons v. South Carolina, 512 U.S. 154, 170 (1994) ("An instruction directing juries that life imprisonment should be understood in its 'plain and ordinary' meaning does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular State defines 'life imprisonment.'").

The government also characterizes as "speculative at best" Tsarnaev's argument about the risk that jurors would draw a negative inference from having been told the consequence of non-unanimity at the earlier stages but not having been told what would happen if they lacked unanimity at the final penalty decision. RB.364. But the principle that an unconstitutional risk can arise from a negative implication in jury instructions has long been established, even in the non-capital

[47] Also, Jones was decided on plain-error review, 527 U.S. at 388–95, whereas here the claim is preserved.

context. See, e.g., Cool v. United States, 409 U.S. 100, 102–03, n.3 (1972) (reversing conviction due to unconstitutional negative implication from a jury instruction on accomplice testimony). Under the circumstances here, drawing a negative inference is reasonable and natural. OB.432.

N.L.R.B. v. SW General, Inc., 137 S. Ct. 929 (2017), cited by the government (RB.365–66), supports Tsarnaev's position. As the Supreme Court there explained, "If a sign at the entrance to a zoo says 'come see the elephant, lion, hippo, and giraffe,' and a temporary sign is added saying 'the giraffe is sick,' you would reasonably assume that the others are in good health." Id. at 940. Similarly here, when jurors were asked to make a gateway finding, an aggravating factor finding, and a weighing finding, and then were told that the result of non-unanimity at either of the first two findings is a mandatory life sentence, but were *not* told anything about the result of non-unanimity for the third finding, jurors would "reasonably assume that" the result of non-unanimity at the weighing finding was something different—namely, a retrial. Id.

The government argues that Appellant "cites no precedent establishing that, if the court instructs on the consequences of deadlock at one stage, it must also do so at every other stage." RB.364. But Appellant does not seek such a rule. His claim focuses on the extraordinary nature of this particular case—because of both the community pressure against a retrial and the presence of instructions about the

consequence of non-unanimity at the first two stages of the death-penalty determination, rendering a parallel instruction for the final weighing stage noticeably absent. There was no good reason for the District Court not to simply tell jurors the truth about the law that governed their decision-making process.[48] The risk of jurors being misled or feeling coerced was palpable and unconstitutional under the FDPA and the Eighth Amendment.

The government cannot show that the Court's error in refusing to accurately instruct jurors on the consequences of non-unanimity at the final weighing stage was harmless beyond a reasonable doubt. OB.435. The government does not contend otherwise. RB.370–71. Instead, it argues only that Appellant has not carried his burden under the more onerous, plain-error standard of prejudice. Id. Appellant does not have to meet the plain-error standard, however, because the error was properly preserved. And given that the government does not even contend it can meet its burden of proving the error harmless, the death sentences must be vacated, and a new penalty phase granted.

[48] Any concern that doing so would improperly empower holdout jurors (RB.356, 358)—while questionable on the merits (see OB.431–32)—is wholly inapposite here, where the District Court had already given complete and accurate instructions that non-unanimity at the gateway- and aggravating-factor stages would result in a mandatory life sentence. 19.A.8666, 19.A.8669.

XII.

The Cumulative Impact Of The Penalty Phase Errors Requires Reversal Of The Death Sentences.

The government concedes that reversal is required when "individual errors, insufficient in themselves to necessitate a new trial," United States v. Sepulveda, 15 F.3d 1161, 1195–96 (1st Cir. 1993), combine to "call into doubt the reliability of the verdict and the underlying fairness of the trial." RB.372 (quoting United States v. Sanabria, 645 F.3d 505, 519 (1st Cir. 2011)). Each penalty phase error alone in Points V–XI is sufficient to vacate the death sentence. Taken together, they compel reversal.

"It was a full-on partnership, a partnership of equals," the government urged the jurors in its final argument. 19.A.8798. "They bear the same moral culpability for what they did together." Id. Tamerlan was dead; Jahar was due the same fate. To achieve this equivalence, as shown ante, Points V–XI, the government wrongly blocked Tsarnaev's key evidence in mitigation, and unfairly saddled him with improper evidence in aggravation. In combination, this systematically skewed the jurors' consideration of the culpability of both the teenage defendant and his older brother.

A fair, reliable penalty phase would have demonstrated that Jahar and Tamerlan were in no way equals. But instead of learning that Tamerlan had [redacted] to commit a gruesome triple murder with him,

these jurors were told that he yelled at a halal butcher, poked a man at the pizzeria, and broke the rules of his gym. Instead of learning that Tamerlan justified that triple murder by radical Islamic teachings, these jurors' picture of Jahar was tainted by the specter of ISIS, and by an unrelated Islamic nasheed scoring photographs of the maimed survivors—witnesses who later testified, inadmissibly, about their post-Marathon lives. Instead of learning that Jahar [redacted] like his brother, these jurors were told only that he did well in school, and shown an unlawfully obtained video of him buying milk and a misleading image of him "flipping off the dead."

After creating these misimpressions, the government exacerbated them. Tamerlan was not the mass killer [redacted]; he was just "bossy," the government argued to the jurors, "the way a lot of older siblings are with their younger siblings." 19.A.8787. Having so limited his mitigation, among the "best evidence" these jurors had about "who the defendant became," the government urged, were "his actions" "at Whole Foods . . . and in this courthouse on the day of his arraignment." 19.A.8804. By making those errors central to its argument for death, the government "call[ed] into doubt . . . the underlying fairness of the trial." Sanabria, 645 F.3d at 519.

Even with this distorted picture of Jahar, the jurors rejected death as to 11 of 17 capital counts (Add.96)—all those in which Tamerlan participated, including the conspiracy to commit the bombings—and at least one juror found all 21 mitigating factors. Add.90–92. Even with a misleading impression of Tamerlan's past, three jurors nonetheless found that Jahar acted under his influence and direction. Id. at 90–91. [redacted], three jurors still found Jahar "particularly susceptible" to Tamerlan's influence, and that he would not have committed the crimes but for his brother. Id. Weighed "against the background of the case as a whole," Sepulveda, 15 F.3d at 1196, the government has not proven "beyond a reasonable doubt that the error[s]," taken together, "did not contribute" to a single juror's selection of the death penalty. Chapman, 386 U.S. at 24.

The death sentences must be vacated.

XIII.

Far From Protecting Tsarnaev's Rights, The Government's *Ex Parte* Channel Of Communication With The District Court Violated Due Process And The Right To Counsel.

The record shows the prosecution in this case secretly had the ear of the District Court. Those *ex parte* proceedings that have been disclosed on appeal do not support the government's contention that it communicated privately with the District Court solely to safeguard Tsarnaev's due process rights. RB.376–77. Instead, the now-disclosed proceedings demonstrate that Tsarnaev's due process and Sixth Amendment rights were violated by these *ex parte* communications, requiring the death sentences be vacated.[49] They also provide reason for this Court to review the remaining twelve *ex parte* proceedings *de novo* to determine whether they should be released to counsel now, so that the issue of whether they were properly held *ex parte* below can be briefed.

A. The now-disclosed proceedings.

When the defense filed a motion challenging the government's proposed trial exhibits (25.A.11481), the District Court called in the government to discuss those exhibits in private, even offering suggestions as to how the evidence could

[49] The government asserts that Appellant has waived any challenge to the non-disclosure below of the 13 *ex parte* proceedings disclosed prior to the filing of the Opening Brief. RB.382. That is not accurate. Appellant challenges on due process grounds the holding *ex parte* of all 26 proceedings. OB.442.

best be shown in trial. 20.A.9513. When, as part of the litigation over the Waltham evidence, the government brought the Court a copy of the Todashev recordings for *in camera* review, the government [redacted]. See Suppl.SAdd; First.Suppl.OB. The Court subsequently relied on the government's arguments—unknown to the defense—to deny disclosure. Add.430.

This was not judicial review of potential Brady information, with notice to the defense, such as this Court approved of in Mehanna, 735 F.3d at 65, contrary to the government's argument. RB.373, 378. Some of the now-disclosed proceedings are substantively innocuous, others are not.[50] But this stream of private discussion of the case without notice to the defense or any finding of necessity by the Court disregarded the adversarial process. "[N]ot only is it a gross breach of the appearance of justice when the defendant's principal adversary is given private access to the ear of the court, it is a dangerous procedure" because it raises the question of whether "the firmness of the court's belief [in the prosecutor's position] may well have been due not only to the fact that the prosecutor got in his pitch first, but, even more insidiously, to the very relationship

[50] Only four of the proceedings since disclosed to the defense relate to potentially discoverable material. [redacted] DE.411, 413, 429, 436. Seven other filings, DE.145, 146, 435, 574, 575, 599, 600, are simply administrative motions for leave to file under seal and the District Court's granting of those motions. They contain no substantive information.

. . . that permitted such [*ex parte*] disclosures." Haller v. Robbins, 409 F.2d 857, 859–60 (1st Cir. 1969); see also United States v. Minsky, 963 F.2d 870, 874 (6th Cir. 1992) ("An *in camera* review is not an open justification for an *ex parte* bench conference.").[51]

The government rests largely on an argument that Tsarnaev has not shown any prejudice from the *ex parte* proceedings. RB.382–83. This argument fails both procedurally and substantively. This Court has instructed that when a defendant's Sixth Amendment right is implicated by the *ex parte* transmission of substantive information by the prosecution to the Court, as occurred in the conference on the Todashev materials, it is the prosecution that bears a heavy burden of showing no prejudice. See Haller, 409 F.2d at 860 ("the burden of proving lack of prejudice is on the state, and it is a heavy one") (citing Chapman, 386 U.S. at 24); see also Bell v. Cone, 535 U.S. 685, 695–96 (2002) (*per se* reversal required "where the accused is denied the presence of counsel at 'a critical stage,' . . . denot[ing] a step of the criminal proceeding . . . that held significant consequences for the accused") (citations omitted). That burden cannot be met here: the District Court denied the defense's motion for disclosure of the Todashev

[51] The government argues that the only problem in Minsky was the timing of the *ex parte* contact. RB.379. That is inaccurate. The Sixth Circuit emphasized that the problem there—as here—was not the *in camera* submission but the government and court discussing a contested motion without the defense. 963 F.2d at 874.

statements after this *ex parte* conference and in reliance on arguments urged by the government during that conference. See First.Suppl.OB. As discussed in detail in the Opening Briefs, the denial of disclosure of these statements containing key mitigation information about Tamerlan's violent past prejudiced the defense and violated the Fifth Amendment. OB.274–285; First.Suppl.OB.; Third.Suppl.OB.1–17.

B. The still-*ex parte* proceedings.

By Order of August 11, 2017, this Court permitted Tsarnaev to re-raise his motion to disclose on appeal the remaining *ex parte* proceedings. Appellant does so here. Should this Court grant the motion and disclose the materials, Tsarnaev respectfully seeks leave to file a supplemental brief if appropriate.

The government concedes that seven of these proceedings relate to contested discovery issues, but asserts that these proceedings were protective submissions of potentially discoverable information to the Court. RB.376–77. Appellant has no way of knowing if this assertion is accurate, but based on the disclosed proceedings discussed ante, there is reason to question it, [redacted]

SA.200–01.

Tsarnaev respectfully requests that the Court review all 12 undisclosed proceedings to ensure that in fact they constitute the submission of potentially discoverable material for *in camera* review. If not, they should be turned over to counsel on appeal, because the government has claimed this as the only basis for conducting them *ex parte*. If they do contain potentially discoverable material, counsel should be informed of at least the topic of that material, so that counsel may present, if appropriate, arguments about whether that material bears on the case in mitigation, and is, thus, discoverable. *De novo* review is appropriate because of the lack of specific findings by the District Court as to why *ex parte* treatment was warranted either below or on appeal.

XIV.

The Underrepresentation of African-Americans In The Grand And Petit Jury Wheels Violated The Fair Cross-Section Requirement Of The Jury Selection And Service Act And The Fifth And Sixth Amendments.

Tsarnaev's Opening Brief contended that the underrepresentation of African-Americans in the grand and petit jury wheels violated statutory and constitutional fair cross-section requirements. OB.444–52. He acknowledged that United States v. Royal, 174 F.3d 1 (1st Cir. 1999), bound this panel to disagree, but raised the claim to preserve the possibility of en banc or Supreme Court review. The government agrees that Royal controls this panel and does not dispute that Tsarnaev has preserved his claim. RB.383–90. For present purposes, nothing else need be said. Nonetheless, the government's arguments that Tsarnaev "has not shown sufficient reason to overrule Royal," and that "[t]his case would also be a poor vehicle for en banc review," RB.388—points better saved for a response to a petition for rehearing en banc, see Fed. R. App. P. 35(e)—merit short replies.

Royal (and its predecessor, United States v. Hafen, 726 F.2d 21 (1st Cir. 1984)) remain sound, the government says, because this Court's "'choice of absolute disparity over comparative disparity . . . is in keeping with the choices made by many of [its] sister circuits.'" RB.388 (quoting Royal, 174 F.3d at 8). But in the ensuing 20 years, the Sixth, Ninth, and Tenth Circuits, all cited in Royal, 174 F.3d at 8–9, have clarified or revised their jurisprudence to align with

Tsarnaev's position and conflict with this Court's. Garcia-Dorantes v. Warren, 801 F.3d 584, 603–04 (6th Cir. 2015) (relying on "combination of absolute and comparative disparity," and leaving open possibility that "disparity of risk" and "comparative disparity of risk" tests "may be useful in some future case"); United States v. Hernandez-Estrada, 749 F.3d 1154, 1160, 1164–65 (9th Cir. 2014) (en banc) ("overrul[ing] the requirement . . . that the absolute disparity test be the exclusive analytical measure" and "hold[ing] that courts may use one or more of a variety of statistical methods," including "the absolute disparity test, the absolute impact test, the comparative disparity test, and standard deviation analysis"); United States v. Orange, 447 F.3d 792, 798 (10th Cir. 2006) ("[W]e have consistently relied upon two measurements: absolute and comparative disparity."). In addition, Royal mischaracterized the Seventh Circuit's position. In a pre-Royal decision, that Court had consulted both absolute and comparative disparity. Johnson v. McCaughtry, 92 F.3d 585, 593–94 (7th Cir. 1996). The inter-circuit consensus on which the government relies to advocate Royal's continuing validity—offering no defense of Royal's correctness as a matter of statistics, (compare OB.449–50, n.170)—has therefore dissipated.

Next, the government argues that "Tsarnaev cannot show that he would be entitled to relief even under the comparative disparity analysis" because he proved comparative disparities of only 34.29% and 30.73%, and "[s]ome circuits have

found no underrepresentation where the comparative disparities were higher." RB.388 (citing Orange, 447 F.3d at 798–99; Ramseur v. Beyer, 983 F.2d 1215, 1232 (3d Cir. 1992) (en banc)). But other circuits have found underrepresentation at the same or lower percentages. E.g., Smith v. Berghuis, 543 F.3d 326, 338 (6th Cir. 2008) (34% comparative disparity), rev'd on other grounds, Berghuis v. Smith, 559 U.S. 314 (2010);[52] United States v. Rogers, 73 F.3d 774, 776–77 (8th Cir. 1996) (30.96%). Moreover, Tsarnaev adduced other measures that the grand and petit jury wheels included fewer African-Americans than expected, including standard deviation, impact of risk, and disparity of risk. OB.446–47 (citing 24.A.11257–59 ¶¶ 30–380; 25.A.11525–27 ¶¶ 30–37). Tsarnaev could establish underrepresentation if this Court abandoned its exclusive use of absolute disparity.

Finally, the government contends that Tsarnaev "could not show that the underrepresentation resulted from 'systematic exclusion of the group in the jury-selection process.'" RB.388 (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)). The District Court rejected Tsarnaev's fair cross-section claims on Duren's second prong, underrepresentation, and thus had no occasion to reach the third prong, systematic exclusion. Add.422–23, 481–82. The systematic exclusion inquiry is fact-intensive. See Alexander v. Louisiana, 405 U.S. 625, 630 (1972) (in

[52] The Sixth Circuit has made clear that this portion of Smith remains binding precedent. Garcia-Dorantes, 801 F.3d at 601–02 & n.12.

pre-Duren case decided under Equal Protection Clause, explaining that "[t]his Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors"); see also, e.g., Smith, 559 U.S. at 330–31 (evaluating factual proof of systematic exclusion). When sitting en banc, this Court does not find facts in the first instance. Conley v. United States, 323 F.3d 7, 14–15 (1st Cir. 2003) (en banc). Thus, in the ordinary course, this Court would address underrepresentation en banc, and if Tsarnaev prevailed, remand for the District Court to make factual findings and a legal ruling on systematic exclusion.[53]

[53] The government's attempt to rule out the use of Massachusetts resident lists as a cause of the underrepresentation (RB.388–90) fails. United States v. Pion, 25 F.3d 18 (1st Cir. 1994), which addressed a claim of Hispanic exclusion in 1992, has limited relevance to Tsarnaev's claim of African-American exclusion in 2015. The resident lists change annually, see Mass. Gen. Laws ch. 234A, § 10, as do population demographics. Tsarnaev did provide evidence that the use of municipal resident lists to populate the jury wheels resulted in the underrepresentation of Bostonians, and thus African-Americans: his expert statistician's declaration. 24.A.11251–52 ¶ 7. Nor did United States v. Green, 389 F. Supp. 2d 29 (D. Mass. 2005), reject this point. To the contrary, Judge Gertner there found that "Boston's share of the names on the master jury wheel is 11.1% less than it would be if it were proportional to Boston's Census-estimated share of the Eastern Division's voting-age population," and that "[t]he four zip codes in Boston with the highest absolute number of African-American residents begin with an underrepresentation on the master jury wheel ranging from 14.83% to 22.57%." Id. at 60.

XV.

This Court Should Vacate Tsarnaev's Death Sentences Under The Eighth Amendment Because He Was Only 19 Years Old At The Time Of The Crimes.

There is no dispute that at the time of the crimes, the 19-year-old Tsarnaev: (1) had no criminal record; (2) had no history of violence; (3) was deemed by his public-school teachers to be "hardworking, respectful, kind, and considerate"; (4) was viewed by high-school and college friends as "thoughtful and respectful of the rights and feelings of others"; and (5) had volunteered many hours helping special-needs children and those with intellectual disabilities. OB.455; RB.390–97.

The 14 years of scientific and legal developments regarding youth and sentencing since Roper v. Simmons, 543 U.S. 551, 578 (2005), compel raising the bright line of age 18 for categorical eligibility for the death penalty. See Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016); Miller, 567 U.S. at 489; Graham v. Florida, 560 U.S. 48, 74–75 (2010). The government ignores the updated scientific research presented showing that many of the same traits possessed by juveniles also apply to emerging adults ages 18–20. OB.456–58. Compliance with the constitutional requirements of the Eighth Amendment in this changing landscape requires a shift to at least age 20 or 21—just as advances in science required the shift from age 16 in Stanford v. Kentucky, 492 U.S. 361, 380 (1989), to age 18 in Roper. 543 U.S. at 578.

Further, the Opening Brief discusses data from the years following Roper about actual executions of those who were emerging adults at the time of their capital crimes, which show that this punishment is rare enough that, under Graham, 560 U.S. at 62–67, it is cruel and unusual. OB.462–63. The government does not dispute that in the modern era of the federal death penalty, no one has ever been executed for crimes committed at age 26 or younger. OB.460.

Categorical exclusion from the death penalty—because Tsarnaev was a teenager—is necessarily significant enough to satisfy any standard of review for reversal, despite the government's contentions about preservation. RB.391. For all these reasons, the government has not refuted that scientific and legal developments since Roper dictate that executing someone who was only 19 years old at the time of his capital crimes would be cruel and unusual punishment under the Eighth Amendment.

XVI.

Davis Requires Vacatur Of The Convictions On Counts 13, 15, 16, 17, And, As The Government Concedes, Count 18.

United States v. Davis, 139 S. Ct. 2319 (2019), requires vacatur of the 18 U.S.C. § 924(c) convictions on Counts 13, 15, 16, 17, and 18. The predicate crime of violence for Counts 13 and 15, arson in violation of 18 U.S.C. § 844(i), fails to satisfy 18 U.S.C. § 924(c)(3)(A)'s elements clause because it: (1) includes the destruction of one's own property; and (2) has a mens rea of recklessness. The predicates for Counts 16, 17, and 18, all conspiracies that criminalize mere agreements, fail because none necessarily entails using force. Second.Suppl.OB.

The government concedes much of the above. It agrees that "arson *simpliciter* . . . is not categorically a crime of violence." Davis.Suppl.RB.16 (citing United States v. Salas, 889 F.3d 681, 684 (10th Cir. 2018)). It acknowledges that under United States v. Rose, 896 F.3d 104 (1st Cir. 2018), "reckless conduct, as opposed to intentional conduct, cannot constitute the use of force against the person or property of another." Davis.Suppl.RB.2. It accepts that "*conspiring* to commit a violent act does not necessarily have as an element the use, attempted use, or threatened use of physical force." Id. at 22. And it consents to vacatur of Count 18, which was predicated on conspiracy to commit arson. Id. at 2–3.

In an effort to salvage the Count 13 and 15 convictions, the government recharacterizes the arson predicates to "import[]," as elements, the "gateway"

intent factors in 18 U.S.C. § 3591(a)(2). Davis.Suppl.RB.14. But the government omits a key detail: the jurors found these factors at the penalty phase, not the guilt phase, after receiving additional evidence and instructions. Because these factors were not necessary to convict Tsarnaev of the arson predicates, they are not elements of those crimes for categorical-approach purposes. The government takes a similar approach with Counts 16 and 17, enlarging the conspiracy predicates to sweep in the death-resulting allegations that made the offenses death-eligible. Although the jury found these allegations proved at the guilt phase, the flaw in the government's analysis is the same. These allegations were unnecessary to convict Tsarnaev of the conspiracy predicates, and so were not elements of those crimes.

A. Counts 13 and 15 must be vacated because § 844(i) arson is not a § 924(c)(3)(A) crime of violence.

The government defends Tsarnaev's Count 13 and 15 convictions, both of which were predicated on § 844(i) arson, on two grounds. First, "[w]here . . . arson is charged as a capital offense, the jury must find as an element at least one of the four 'gateway' special intent factors enumerated in . . . 18 U.S.C. § 3591(a)(2)." Davis.Suppl.RB.1. Each of these factors, the government says, "requires proof that the defendant engaged in intentional conduct that directly resulted in a victim's death," and thus proof that "the defendant intentionally used force sufficient to kill the victim." Id. Second, "the separate element that 'death result[]' from the arson independently requires proof that the victim was subjected

to 'physical force' within the meaning of the elements clause." Id. (quoting §§ 844(i) and 924(c)(3)(A)). The government is mistaken on both grounds.

1. Section 3591(a)(2)'s gateway factors do not figure in the analysis.

The gateway factors do not figure in the crime-of-violence analysis because the jurors found them at the penalty phase, not the guilt phase. As the government agrees, under the applicable categorical approach, this Court "'focus[es] solely' on 'the elements of the crime of conviction.'" Davis.Suppl.RB.11 (quoting Mathis v. United States, 136 S. Ct. 2243, 2248 (2016)). "'Elements' are . . . the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant." Mathis, 136 S. Ct. at 2248 (quoting Black's Law Dictionary 634 (10th ed. 2014)). Here, the relevant "crimes of conviction" were Counts 12 and 14, the arson predicates for the challenged § 924(c) counts (Counts 13 and 15). Add.34–35, 38–39. To convict on Counts 12 and 14, the government did not have to prove, and the jury did not have to find, the gateway factors. See 15.A.6876–78 (guilt-phase jury charge); Add.74m, 74o, at 13, 15 (guilt-phase verdict). Rather, as to mental state, in line with the mens rea charged in the indictment (Add.32–33, 36–37), the District Court told the jury that it could convict Tsarnaev after finding that he acted "maliciously," that is, "intentionally or with deliberate disregard of the likelihood that damage or injury will result." 15.A.6876. The guilt-phase verdict form did

not ask the jury to find any mental state other than "malicious[ly]" (id. at 74m, 74o), and the gateway factors do not appear anywhere on the form. Id. Because the gateway factors were not necessary to conviction on Counts 12 and 14, they were not elements of those crimes. See Mathis, 136 S. Ct. at 2248; United States v. Taylor, 848 F.3d 476, 491 (1st Cir. 2017).

The jurors only found the gateway factors proved at sentencing, after "convict[ing] the defendant." Mathis, 136 S. Ct. at 2248. And the jurors did so only after hearing additional evidence that went to Tsarnaev's mental state on these counts, and receiving additional instructions. E.g., GX–1633; 16.A.7409–18 (testimony as to placement of bomb); see 19.A.8660, 8663–66 (penalty-phase jury charge); Add.79–81 (penalty-phase verdict). With respect to the gateway factors, the District Court instructed the jurors not to "rely solely on your first-phase verdict of guilt or your factual determinations in that phase. Instead, you must now each consider and decide the issue again for the purposes of this trial." 19.A.8664. These sentencing factors cannot be "imported" into the elements of crimes proved at the guilt phase. Davis.Suppl.RB.14.

To put the point in a different way, if the penalty-phase jurors had found the gateway factors not proved beyond a reasonable doubt as to Counts 12 and 14, Tsarnaev would not have been entitled to judgment of acquittal on those counts. Logically, those factors were not elements of the arson predicates. Nor may this

Court "look to" the penalty-phase verdict form to determine Tsarnaev's actual mental state in committing the Count 12 and 14 offenses. Davis.Suppl.RB.20–21 (citing Mathis, 136 S. Ct. at 2249). As Tsarnaev has shown, without objection from the government, § 844(i)'s mens rea element ("maliciously") is indivisible between intent and recklessness. Second.Suppl.OB.11. Consequently, Descamps v. United States, 570 U.S. 254, 258 (2013), precludes consulting supplementary documents to further narrow this element.

2. The death-resulting allegations do not supply an independent ground for affirmance.

The government contends that the death-resulting allegations in Counts 12 and 14 offer an independent basis for this Court to conclude that the § 844(i) predicates satisfy § 924(c)(3)(A)'s elements clause. Davis.Suppl.RB.1, 3, 14–16. They do not. Because the gateway factors are not elements of the relevant crimes of conviction, then—even if the death-resulting allegations are elements[54]—the minimum conduct necessary to commit arson resulting in death is still the *reckless* destruction of property resulting in death. E.g., United States v. Gullett, 75 F.3d 941, 947–48 (4th Cir. 1996) (holding evidence sufficient to convict defendant of § 844(i) offense resulting in death based on reckless mens rea; rejecting defendant's argument that intent was required). That offense may involve the

[54] As explained below, post § XVI.B, they are not. For purposes of the arson predicates, however, the parties' dispute on this issue is immaterial.

application of physical force to another person, but it does not involve the *intentional* application of such force, which is what Rose demands. 896 F.3d at 109–10. See Bennett v. United States, 868 F.3d 1, 7–9 (1st Cir. 2017) (holding that recklessly causing bodily injury does not constitute the "use . . . of physical force"). As Tsarnaev has shown, § 844(i)'s "death results" language creates no additional mens rea requirement, and this Court has held that materially identical language in 21 U.S.C. § 841(b)(1)(C) "imposes 'strict liability'" for the causation of death. Second.Suppl.OB.14 (quoting United States v. Soler, 275 F.3d 146, 152–53 (1st Cir. 2002)). The jury instructions here were in accord. See id. (quoting 15.A.6876, 6878). Consequently, the government's second argument for affirming Tsarnaev's convictions on Counts 13 and 15 adds nothing to its first.

B. Counts 16 and 17 must be vacated because conspiracies are not § 924(c)(3)(A) crimes of violence.

The government defends Tsarnaev's Count 16 and 17 convictions—predicated, respectively, on conspiracies to use a weapon of mass destruction, 18 U.S.C. § 2332a(a)(2), and to bomb a place of public use, 18 U.S.C. §§ 2332f(a)(1) and (2)—on the ground that the jury found these predicate offenses to have resulted in death. "When death has actually resulted," the government says, "the offense has moved beyond an inchoate agreement. The conspirators must have engaged in some act that resulted in death. And the death must have resulted from the use of force." Davis.Suppl.RB.22–23. Again, the government is wrong.

First, largely for the reasons set forth above with respect to the gateway factors, the death-results allegations are not elements of the predicate conspiracies for categorical-approach purposes. True, unlike the gateway factors, the jury found the death-results allegations proved at the guilt phase. But in all other respects, the analysis is the same. The jury did not have to find these allegations proved to convict Tsarnaev of the predicate conspiracies, or for these conspiracies to sustain the challenged § 924(c) counts. A jury finding that the government had not proved the death-resulting allegations would not have entitled Tsarnaev to a judgment of acquittal on the conspiracies. In addition, the categorical approach focuses on the minimum conduct necessary for conviction. See Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015). To convict Tsarnaev of the conspiracy predicates, the jury only had to find two elements: agreement to use a weapon of mass destruction, and knowingly joining the agreement intending that the crime of using a weapon of mass destruction be committed. 15.A.6850.

For example, Count 16 alleged that the predicate crime of violence was "conspiracy to use a weapon of mass destruction, as charged in Count One." Add.40. Count 1, in turn, charged that Tsarnaev "knowingly conspired . . . to use a weapon of mass destruction" (¶ 12), and then, in a separate paragraph included to increase the statutory maximum sentence, charged that "[t]he conspiracy resulted in at least one person's death" (¶ 13). Add.5. That is, Count 1 itself defined the

relevant "conspiracy" as conspiracy to use a weapon of mass destruction *simpliciter*, then added a separate allegation ("[t]he conspiracy resulted . . .") for sentencing—much like the gateway factors. The jury instructions (15.A.6850–52) and the verdict form (Add.74b) did likewise. All made clear that the jury could convict Tsarnaev of the "conspiracy" charged in Count 1 without finding that death resulted. Acquittal on the death-resulting allegation would not have entitled Tsarnaev to vacatur of the Count 1 conviction. The same reasoning applies to Count 17, which charged the Count 6 conspiracy to bomb a place of public use *simpliciter* as the predicate crime of violence. See Add.21–22, 42–43 (indictment); 15.A.6850–52 (jury instructions); Add.74g (guilt-phase verdict form).

Second, even if considered, the death-resulting allegations do not establish the intentional use of force. Those allegations did not require Tsarnaev to engage in any additional conduct or to form any additional mens rea. Second.Suppl. OB.17–18 n.3. Rather, they alleged only "factual consequences," and "[n]othing in § 2332a(a) links the 'if death results language' to any scienter whatsoever." McVeigh, 153 F.3d at 1195. From the actual elements—for Count 1, an agreement to use a weapon of mass destruction against any person or property; knowingly joining the agreement with the intent that its objective be achieved; and death resulting—the government divines another (intentionally using force against the person of another, Davis.Suppl.RB.24) that is not there.

C. Tsarnaev's motion for judgment of acquittal preserved this claim, so this Court reviews *de novo*.

Tsarnaev moved for a judgment of acquittal on all of the § 924(c) counts, arguing that none of the predicate offenses qualified as crimes of violence under § 924(c)(3). DE.1506, at 29; DE.1589, at 7–8. This motion preserved his current claim. See United States v. Cruz-Rivera, 904 F.3d 63, 65 (1st Cir. 2018). Cruz-Rivera arose in an identical procedural posture and addressed an identical claim: Cruz had not moved to dismiss the indictment or objected to the jury charge, but had moved for a judgment of acquittal on his § 924(c) counts on the ground that the underlying predicates were not crimes of violence. Id. (citing Fed. R. Crim. P. 29). This Court recognized that the issue was preserved and reviewed *de novo*.

The government counters that Cruz-Rivera "did not definitively opine on" the preservation question because there, "the government never challenged the preservation of the claim." Davis.Suppl.RB.8. When this Court conducts *de novo* review of an unpreserved claim because the government has failed to seek plain-error review, this Court says so. E.g., United States v. Encarnacion-Ruiz, 787 F.3d 581, 586–87 (1st Cir. 2015) (collecting cases). Cruz-Rivera said nothing of the sort. This Court said, simply: "Cruz preserved this issue below." 904 F.3d at 65.

In urging plain-error review (Davis.Suppl.RB.7–9), the government neglects that Fed. R. Crim. P. 52(b) applies only to errors "not brought to the court's attention." Tsarnaev brought this error to the District Court's attention by moving

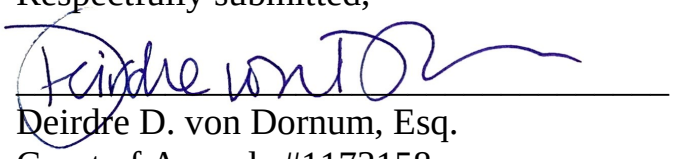
for a post-trial judgment of acquittal. The basis for the motion was not "reasonably available" pretrial, Fed. R. Crim. P. 12(b)(3), before Johnson v. United States, 135 S. Ct. 2551 (2015). See Lassend v. United States, 898 F.3d 115, 122–23 (1st Cir. 2018). Nor does the government explain why the precise vehicle matters. Tsarnaev contends that, as a matter of law, his § 924(c) convictions did not rest on predicate crimes of violence. Whether that claim was raised pretrial or post, the parties' arguments and the District Court's legal analysis would not have differed. The government asserts no prejudice. If anything, the submission of invalid capital counts to the jurors at the penalty phase harmed Tsarnaev. The parties fully litigated this issue below, the District Court declined to rely on forfeiture or waiver and issued a written decision on the merits, and the question is purely legal. This Court reviews *de novo*.

Conclusion

For the foregoing reasons, this Court should:

- For **Point I**, reverse the convictions, or in the alternative, the death sentences;
- For **Point II**, reverse the convictions, or in the alternative, the death sentences, or again in the alternative, remand for further proceedings;
- For **Point III**, reverse the death sentences;
- For **Point IV**, reverse the convictions, or in the alternative, the death sentences;
- For **Points V–VII**, reverse the death sentences;
- For **Point VIII**, remand for further proceedings;
- For **Points IX–XII**, reverse the death sentences;
- For **Point XIII**, reverse the convictions, or in the alternative, the death sentences;
- For **Point XIV**, remand for further proceedings;
- For **Point XV**, reverse the death sentences and remand for the imposition of sentences of life imprisonment;
- For **Point XVI**, vacate the convictions on Counts 13, 15, 16, 17, and 18 and remand for the entry of a judgment of acquittal.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

1. By order of October 1, 2019, this Court allowed Tsarnaev's motion to file an overlength brief that does not exceed 55,000 words. This brief complies with that order because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 49,807 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using **Microsoft Word** in **14-point font** in **Times New Roman** type style.

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Dated: New York, New York
October 10, 2019

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically through the ECF system to the registered participants as identified on the Notice of Electronic Filing (NEF) and by FEDEX on October 10, 2019 to:

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